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PRACTICE REPORTS

IN THE

S U P R E M E C O U R T

AND

C O U R T O F A P P E A L S

OF THE

STATE OF NEW-YORK.

By NATHAN HOWARD, Jr.,
COUNSELLOR-AT-LAW, NEW-YORK.

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VOLUME XVI.

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PRACTICE REPORTS.

SUPREME COURT.

BEACH agt. THE BAY STATE STEAMBOAT COMPANY.

Any state or nation has a right to give its citizens redress for any personal injuries, committed without, as well as within its territorial limits, when it obtains the means of exercising jurisdiction over the wrongdoer. Nor is the authority of the state curtailed in this respect, because the redress is given by *statute* instead of the common law.

A purely *penal* law is strictly local, and has no operation beyond the jurisdiction of the country where it was enacted. But whether a *remedial statute* is *extra-territorial*, in reference to the class of injuries for which it provides, depends, like other statutes, upon the intention of the legislature; a *penal statute* may also be a remedial law; and a statute may be penal in one part and remedial in another.

Held, that the statutes of 1847 and 1849, allowing compensation to the representatives of deceased persons for causing death by wrongful act, neglect or default, although the second section of the act of 1849 is undoubtedly penal, are entirely remedial.

And there is no reason to infer, that the legislature intended to confine the operation of these acts, in their remedial features, to injuries committed within the territorial limits of this state, or to exempt therefrom persons natural or artificial, residing in other states, (where jurisdiction is acquired over them.)

It seems, that these statutes merely provide in their remedial character, an extension of the remedy afforded by the common law.

New-York Special Term, April, 1858.

DEMURRER to complaint.

VOL. XVI.

Beach agt. The Bay State Steamboat Company.

_____, *for plaintiff.*
_____, *for defendants.*

CLERKE, Justice. It cannot be denied that any one state or nation has a right to give its citizens redress for any personal injury committed without, as well as within its territorial limits, when it obtains the means of exercising jurisdiction over the wrongdoer. This has been always recognized in the common law. Many, if not most of the actions instituted in our courts of justice, are transitory and not local; and if the cause upon which any one of them is founded, arose in Japan, it would be just as tenable as if it arose in the state of New-York. The authority of the state in this respect is not curtailed, because the redress is given by statute, instead of having been permitted by the common law. They are both alike, the expression of the supreme power, equally entitled to obedience and respect.

It is erroneous, therefore, to say "that statutes (which means *all* statutes) are local, and only effectual within the limits of the state, on acts therein done." A penal law, indeed, is strictly local, and has no operation beyond the jurisdiction of the country where it was enacted. But, whether a remedial statute is *extra-territorial* in reference to the class of injuries for which it proposes to afford redress or compensation, depends, like other statutes, upon the intention of the legislature, to be gathered from the language employed, the law as it previously existed in relation to the same subject, the mischief to be prevented, and the remedy to be applied. And, we must also bear in mind, that every such statute is to be liberally construed.

It has been asserted that the statutes of 1847 and 1849, allowing compensation to the representatives of deceased persons for causing the death of those persons by wrongful act, neglect or default, are penal, and not remedial statutes. The second section of the act of 1849, is undoubtedly penal. But a penal statute may also be a remedial law, (1 *Wils.* 126 ;) and a statute may be penal in one part, and remedial in an-

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other. (*Dougl. 702.*) But in the redress which these statutes afford to the bereaved families of those who have been deprived of life, by the wrongful act, neglect or default of others, they are entirely remedial; and they are calculated to be most beneficent in their operation, not only in their compensatory effect in warding off, at least for a season, the destitution of many a family, bereft of its provider, but in preventing the frequent occurrence of the melancholy disasters, which are, too often, the result of the most culpable carelessness and disregard of human life.

I can see no reason to infer, that the legislature intended to confine the operation of these acts, in their remedial features, to injuries committed within the territorial limits of this state, or to exempt persons, natural or artificial, residing in other states, provided the necessary steps are taken to obtain jurisdiction over such persons. The language is, doubtless, very general, and does not expressly specify injuries committed without the state, and does not specify anything relative to the residence or citizenship of the perpetrators of the injury, or if they are artificial persons, the place or country where they might have been organized. But on the other hand, it does not except such injuries or such persons; and there is no reason whatever to suppose, when we consider the nature of the calamity to be redressed, and the purpose for which redress is prescribed, that the legislature intended any restriction beyond what the generality of the language itself imports.

With regard to the penal section of the act of 1849, we cannot, by that, construe the remedial section. Each stands by itself on the well known rules of construction; a strict construction for the one, a liberal construction for the other; and in the absence of anything to the contrary, we are to suppose that the legislature intended that the acts in question should be interpreted according to those rules, which are part and parcel of the law of the land, recognized by the legislature as well as by the judiciary; and all laws, it must be presumed, are framed in reference to them.

And after all, do not these statutes merely provide, in their

 Pratt and others agt. Conkey.

remedial character, an extension of the remedy afforded by the common law? To be sure, the death of the deceased, and not the injury which caused the death, is the immediate ground of the action. But the death is the sad result and serious aggravation of the injury, by which the family are deprived of the means of support, as the deceased person himself, if he survived the injury, would, according to the extent of it, be deprived of the ability to contribute to their support. If Mr. Beach were maimed and mutilated by this explosion, and survived the accident, he certainly would, by common law, have a right of action for damages against the defendants, whether it occurred within this state or not. The action would be, undeniably, transitory. Do these acts, in their remedial features, go any further than to extend and transmit this common law right, giving compensation for the injury that produced the death, to the family and representatives of the deceased?

For these reasons, I hold that this action is well brought, even on the assumption, that the explosion occurred without the territorial limits of the state of New-York.

Demurrer overruled with costs, with liberty to answer within ten days on payment of costs.

SUPREME COURT.

The People *ex rel.* DINSMORE & WOOD agt. THE CROTON
AQUEDUCT BOARD.

The Code, admitting all parties to be heard in one suit, does not apply to the writ of *mandamus*.

Where the Croton Aqueduct Board awarded a contract for building a new reservoir in the city of New-York, to Fairchild & Co., upon which, Dinsmore & Wood, whose application for the same was rejected, sued out a writ of *mandamus*; and on appeal to the general term by Dinsmore & Wood, they procured an order to stay proceedings until a final hearing should be had;

The People ex rel. Dinsmore & Wood agt. The Croton Aqueduct Board.

Held, on motion by Fairchild & Co., to vacate this stay of proceedings, that they were not in a situation to move for such an order. They were no parties to the mandamus, and were in no wise affected by the judgment and order upon it. The order did not bind them, and as against them, did not protect the Croton Board.

New-York Special Term.

ROOSEVELT, Justice. The Croton Board having advertised for contracts for building a *new reservoir*, various proposals were sent in, and among them one from Dinsmore & Wood, and one from Fairchild & Co. After full consideration, the board concluded to award the contract to the latter firm, upon which the former sued out a writ of mandamus. The case was heard before Judge PEABODY, who confirmed the decision of the Aqueduct Board. From this judgment Dinsmore & Wood appealed to the general term and obtained a stay of proceedings till the final hearing should be had. It is now alleged that they have taken no steps to bring on that hearing, and that the stay of proceedings ought therefore to be revoked.

A sufficient answer to the motion of Fairchild & Co., would seem to be that they were no parties to the mandamus, and were in no wise affected by the judgment and order upon it. The order does not bind them, and, as against them, does not protect the Croton Board. They can demand the contract, and if refused, and if they are right, they can enforce the demand notwithstanding an order to stay proceedings made in a cause to which they were not parties. The same remedy by mandamus against public officers, is open to them as was taken by their competitors, Messrs. Dinsmore & Co.; and the same reasons, if sound, which induced the judgment *against* Dinsmore & Co., would equally, it is presumed, insure a judgment *in favor* of Fairchild & Co. Two suits, it is true, would be the consequence; an inconvenience, no doubt, to the parties, but one for which the law as yet has provided no remedy. The Code, admitting all parties to be heard in one suit, does not apply to the writ of mandamus. The 471st section expressly excludes

In the matter of the petition of Mary Van Wagenen.

that class of cases. It may be, that the Croton Board could have filed a bill of interpleader. Of the expediency of doing so, they were the judges. Or all parties may unite in a statement of facts—which could readily be agreed upon—to be submitted to the general term, accompanied by such arguments as the respective counsel might see fit to urge.

It is enough, however, for the determination of the present application, that the rules of law as at present existing in cases of mandamus, and “until, (as the Code expresses it,) the legislature shall otherwise provide,” do not allow an outside party to intervene on such an appeal as that taken by Dinsmore & Co. Whether the court should hear the counsel of Fairchild & Co., as *amicus curiæ*, when the argument is brought on, will be for the general term to decide. It is competent to the judges to listen in that character, to the suggestions of any member of the bar in any case. No formal order is necessary, and certainly none would be proper to be made by a single judge at special term to control the discretion of his brethren on the general term bench.

The motion made by Fairchild & Co., to vacate the stay of proceedings in the Dinsmore suit, and to place that suit on the present general term calendar, and to permit Fairchild & Co. to be heard by counsel on the Dinsmore appeal, must, therefore, be denied.

SUPREME COURT.

In the matter of the petition of MARY VAN WAGENEN.

The testator, by his will, authorized his executors to lease to his widow, for a term not exceeding fourteen years, his house in Murray street, (New-York,) at a rent of \$800, they, and not the lessee, paying all taxes, assessments, insurance and repairs. The lease, however, was to be “on the condition that she should occupy the premises for her residence.”

In the matter of the petition of Mary Van Wagenen.

After the death of the testator, it appeared that great changes were taking place in that part of the city, and the immediate neighborhood, which had rendered the premises unsuitable for a residence, (where the widow and family then resided,) but of far more value for business.

The question was, whether under the will there was any authority to change the residence during the lease? Under a clause of the will which authorized the executors, not only to make repairs on the real estate, (not excepting the Murray street residence,) but *alterations* and "improvements to the buildings" as they may consider most for the benefit of those interested therein, extending even to the "removal of existing buildings, and the erection of other buildings, of such form and construction as they (the executors) may think most expedient." The court *held*, that with the consent of the widow, the executors were clearly empowered to tear down the dwelling in Murray street, and erect a store or other structure thereon, corresponding with the altered condition of things.

New-York, Special Term.

ROOSEVELT, Justice. The late Hubert Van Wagenen, by his will, which was made in 1847, in addition to an allowance for the support of the children, gave his widow an income for her life, of two thousand dollars per annum. He also authorized his executors to lease to her, for a term not exceeding fourteen years, his house in Murray street, at a rent of \$800; they, and not the lessee, paying all taxes, assessments, insurance and repairs. The lease, however, was to be "on the condition that she should occupy the premises for her residence."

The testator died in 1850, leaving a widow and five infant children; all of whom still continue to reside in the house before mentioned. But great changes are now taking place in that quarter of the city; and among them is the demolition of the house adjoining the widow's dwelling, and an excavation below its foundation. What, then, is to be done in this unforeseen change of circumstances? The lot, while unsalable on the one hand, for a residence, has, on the other, become far more valuable for business. Must the family, it is asked, on pain of forfeiture, still continue to reside there? Is there no escape from such a gratuitous loss and inconvenience, injurious to all and beneficial to none?

Yertore, &c. agt. Wiswall, &c.

In the third clause of his will, the testator, I find, has authorized his executors, not only to make repairs on his real estate, (not excepting the Murray street property,) but *alterations* and "improvements to the buildings," as they may consider most for the benefit of those interested therein, extending even to the "removal of existing buildings, and the erection of other buildings of such form and construction as they (the executors) may think most expedient."

Under this provision, the executors, it seems to me, with the consent of the widow, are clearly empowered to tear down the dwelling referred to, and erect in its stead, out of any "personal estate" of the testator, a store or other structure corresponding with the altered condition of things, and to pay to the widow, as part of the expense of making the change, a fair equivalent for the value of her leasehold interest. Such equivalent to consist either of a sum in gross, or, which would, perhaps, be more consistent with the general spirit of the will, of a stipulation to pay her from time to time, without the power of anticipation, so much of the increased rents as shall remain after deducting the interest and taxes on the cost of the new building, and a ratable portion of the insurance, besides the eight hundred dollars per annum with which she is now chargeable.

An order in accordance with the above may be drawn and submitted to the court.

SUPREME COURT.

SOPHIA YERTORE, administratrix of, &c., GEORGE YERTORE, deceased agt. JOHN P. WISWALL and EBENEZER WISWALL, Executors of, &c., EBENEZER WISWALL, deceased.

It is no less necessary now than formerly, to set forth with legal precision, all the substantial facts which go to make up the cause of action, and especially where a new statutory remedy is invoked, in order to support the plaintiff's pleading.

NEW-YORK PRACTICE REPORTS.

Yertore, &c. agt. Wiswall, &c.

An action for damages by the legal representatives of a person killed by the wrongful act, neglect or default of a wrongdoer—common carrier—brought under the statutes of 1847 and 1849, is sustainable against the *representatives* of the wrongdoer, because it is brought for the enforcement of a statutory right of property.

The *survivorship* of such an action is founded upon the idea that it is a right of *property*, and has a determinate pecuniary value; that it vests absolutely in the widow and next of kin, and is to be distributed to them in the same proportions, as the personal property of the deceased; consequently, survives against the executors or administrators of the wrongdoer by the express words of the Revised Statutes. (2 R. S. 447, § 1.)

Therefore, the *form* of the action, whether stated as upon contract or for a wrong, or both, (as in this case,) is not material.

Albany General Term, March, 1858.

WRIGHT, GOULD and HOGEBOM, *Justices.*

THIS was an appeal by the defendants from an order of Mr. Justice GOULD; overruling a demurrer to the complaint. The complaint averred that Ebenezer Wiswall, deceased, having a ferry license from the county court of Albany county, authorizing him to run a ferry between Troy and West Troy, *undertook for the compensation provided in his license*, to convey George Yertore, deceased, across the Hudson river in a skiff, run at said ferry, and *carelessly and negligently* upset the skiff containing the said Yertore while he was so being conveyed across said river; whereby Yertore was drowned, and drowned by the *careless and negligent acts of the said Wiswall and his servant*; that he left a widow who is the plaintiff in the action; and that the *pecuniary injuries resulting from the death* of the said George Yertore to his wife and next of kin, are at least \$5,000. The complaint proceeds to allege the subsequent death of Wiswall, and the appointment of personal representatives, both of Wiswall and Yertore, and demands judgment, "for the pecuniary injuries so sustained," in the sum of \$5,000.

The defendants demurred to the complaint, and alleged for cause: 1. That the facts set forth were not sufficient to constitute a cause of action against Wiswall, in his lifetime.

2. That the cause of action, if any, died with said Wiswall, and did not survive against the defendants.

Yertore, &c. agt. Wiswall, &c.

Mr. Justice GOULD overruled the demurrer, and the defendants appealed from his order to the general term.

GEO. VAN SANTVOORD, *for the defendants.*

R. A. PARMENTER, *for the plaintiff.*

By the court—HOGEBROOM, Justice. This action is not brought by or against either of the original parties to the transaction, and it becomes therefore essential to determine whether the cause of action survives. The complaint is inartificially drawn, which is the more to be regretted, inasmuch as the character of the cause of action must frequently depend upon the insertion or omission of particular averments in the complaint, which may be either inserted or omitted without violating the truth. Thus in an action against a common carrier—and a ferryman is a common carrier—the character of the action, whether contract or tort, the remedies by which it is to be enforced, arrest and imprisonment of the person, or process against the property alone, and perhaps the question whether it survived or not, certainly at the common law, depended upon the mode in which the facts were set forth in the complaint. If it was alleged that the carrier agreed for a stipulated compensation to transport the passenger safely, that not fulfilling his agreement he did not do so, and that in consequence thereof the plaintiff sustained damage in his business and engagements, the pleading was plainly upon contract, the remedy of the successful party was restricted to property, and the cause of action palpably survived both, in favor of the personal representative of a deceased plaintiff and against the personal representative of a deceased defendant. (1 *Ch. Pl.* (7th ed.) 114; *People agt. Gibbs*, 7 *Wend.* 29.)

On the other hand, if it was alleged merely that the plaintiff took passage, or was transported in the defendant's boat; that the defendant wrongfully or negligently navigated or propelled the same, so that in consequence thereof the boat was upset and the plaintiff injured; the pleading was as manifestly *ex delicto*; the defendant might be arrested and held to bail, and on penal process his person imprisoned, and if either party died

before verdict, the cause of action was forever extinguished. (1 *Ch. Pl.* (7th ed.) 106, 152: *Code*, §§ 179, 288; *Burkle agt. Ellis*, 4 *How. Pr. Rep.* 288.)

And yet it is obvious that either statement might well consist with the real facts of the case. The one party did pay the ferriage, the other party in consideration thereof, did impliedly, and often expressly, agree to transport him safely. He did not in fact do so, but by negligence or wilfulness upset his boat, and caused serious injury to the aggrieved party, both to his person and his business.

It is, therefore, no less necessary now than formerly, to set forth with legal precision all the substantial facts which go to make up the cause of action, and especially where a new statutory remedy is invoked, in order to support the plaintiff's pleading.

Nevertheless, as the evident policy, as well as the express language of the Code, requires the courts to disregard mere form, and to confine their attention to matters of substance, and as a simple and obvious remedy by motion has been provided, to make vague and imperfect allegations more definite and certain, I think we should give to the averments in a pleading under the new system, a liberal and indulgent construction, for the purpose of ascertaining and giving effect to their real intent and object.

In the complaint under consideration, there is no direct reference to the statute of 1847. (*Laws of 1847, ch. 450.*) As it is a public act, I suppose it was not necessary that there should be. It is, however, fairly inferable, that the remedy sought was under that statute, for, 1. Every lawyer ought to know that independent of that statute, an action could not be brought in favor of the representatives of a deceased party, for an injury causing death, and basing the claim to relief on that fact.

2. The injury is alleged to have occurred through the careless and negligent acts of the defendant, resulting in death.

3. The pecuniary injuries resulting from such death, to the wife and next of kin, are averred at \$5,000, as the ground and measure of damages, almost in the very words of the statute.

4. The judgment sought is \$5,000, the limit of the statute, "for the pecuniary injuries so sustained."

I think we must therefore turn our attention to that statute, in connection with the amendment of 1849, (*Laws of 1849, ch. 256,*) to test the question whether the cause of action thereby allowed, is of a character which according to the rules of law, or to a fair interpretation of the statute itself, will survive against the representatives of the wrongdoer.

The question is one of considerable practical importance. Cases under it are likely often to arise. Views to some extent conflicting, have been expressed by different judges on the subject. Results of considerable magnitude, growing out of the occurrence which gave birth to this suit, and as is well understood, to several others, may be more or less dependent upon the decision of the question presented by this demurrer. And these considerations must be the apology for further discussing questions which have been already treated at length, and with ability, by two of my brethren.

The action authorized by the law in question, I regard as *new and original*, not merely as to the parties who may institute it, but as to the cause of action involved. It is not given to the party actually injured, for he is dead—it is not given on account of his personal sufferings, for they are limited to himself—it is not given to his personal representatives, because they represent him, but because they are convenient trustees for others. The damages recovered are not assets in their hands for the payment of debts or of legacies, nor would they be subject in any degree to the claims of creditors or of legatees, but they belong to the wife and the next of kin, as their *property*, made so by statute. They are graduated by the *pecuniary* injuries which result from the death, not to the man himself, not to his estate, not to his creditors, but to the wife and the next of kin. The loss which *they* sustain is the loss recovered; the *pecuniary* interest which they have in his life, is the measure of damage. They are to have a fair and just *compensation* for the injuries by them sustained. They recover the value of his life—the value *to them*. It is a statutory property, created by

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the statute and vested in the family of the deceased. Nobody else has a right to it, or to dispose of it. It is in some sense making merchandise of life, and, therefore, in a degree repugnant to refined and sensitive minds, but it is nevertheless the statute law of the land.

I think this view of the case is not answered by saying that the statute was intended merely to remove the legal disability of death, from actions brought to recover for personal injuries. It is true, the statute says, the party committing the injury shall be liable, notwithstanding the death of the person injured; but it does not say it, I think, for the purpose of continuing the action or the cause of action existing before the death, but for the purpose of declaring that the death of a party should not be, as it formerly had been, an effectual bar to a claim for damages against the wrongdoer, who ought to suffer for his misconduct. The action authorized, is a new action, not another action continued. It would not be proper, I think, if an action had been commenced during the life of the party injured, for the personal injuries sustained, to ask for a continuance of it after his death, under the provisions of this statute, but it is, "*an action*," a new and independent action, which is thus authorized. So the *cause* of action is not the same but different. It does not seem to me that it would be necessary or admissible in an action under this statute, to incorporate in the complaint any averments of personal injury or special damage, or circumstances of aggravation to the person injured; nor would it be proper to charge a jury that they might legitimately take these into consideration in making up their verdict. The naked questions are: 1. Was the death occasioned by the wrongful act, neglect or default of the party sought to be charged? and 2. What are the *pecuniary injuries* resulting from such death—the *pecuniary* injuries alone—no other—to the widow and next of kin of the deceased?

Nor do the words in the act, that the damages thus recovered shall be distributed among the widow and next of kin of such deceased person, according to the law for the distribution of personal property, help the defendant's construction. I think

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they have the contrary effect. I think they were *mainly* employed to designate an equitable standard of distribution among the several persons entitled to the amount recovered; but assuming the fact to be otherwise, then the argument is equally strong, that the statute recognizes these damages as property, as assets, as a part of the *estate* of the deceased person, and not as mere floating, equivocal and unsubstantial elements of claim, depending for their vitality and ultimate recovery upon the continued life of the party injured, and wholly dissipated by his death.

A similar construction was put upon this statute by the superior court of New-York, in *Safford agt. Drew*, (3 *Duer*, 627,) also by the court of queen's bench in England, in the case of *Blake agt. The Midland Counties Railway Co.*, (10 *Eng. Law & Eq. Rep.* 139,) which was a case under the statute of 9 and 10 *Victoria*, *ch.* 93, nearly similar to ours. In the latter case, the court limited the recovery with great strictness to the mere pecuniary injury sustained by the family of the deceased, excluding not only all personal injury to the deceased party, but the mental sufferings of the survivors.

If this view of the statute be correct, then the subject of this action is *property*—the *value* of a *life*—property in the same sense that a horse or an article of furniture is property—property in the same sense that an estate for years or for life in lands, or a life insurance policy, is property—and being such, the question is whether the parties sustaining the loss have not the same remedy against the personal representatives of the wrongdoer, that they have in the case of other property wrongfully injured or destroyed. I think they have, and that therefore the action is sustainable against the representatives of the wrongdoer, not so much because it is in *form* on contract or for a wrong, (and this particular complaint contains allegations of both kinds,) but because it is brought for the enforcement of a statutory right of property. I think if the statute had simply declared that the widow and next of kin of a deceased party should have a right of action against the wrongdoer for the pecuniary injuries sustained by them by his death, when

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caused by the wrongful act, default or neglect of such person, it would have created a cause of action, which from its intrinsic character, would survive against the personal representatives of the wrongdoer, not because the statute has so in terms declared, for it has not done so, but as a necessary consequence and attribute of the nature of the right thus conferred. (2 R. S. 447, § 1.)

This view of the case is strengthened, if not authoritatively maintained, by the opinion of Mr. Justice COMSTOCK, in the court of appeals, in *Quin agt. Moore*, (15 N. Y. Rep. 432.) He argues with much force the *assignability* of such a claim as is given by this statute; and although the question was not perhaps directly involved in the case, or absolutely essential to its decision, so as to give it the binding force of an adjudication of a superior tribunal, the reasoning employed is directly applicable to the case at bar. If the demand is assignable, it would seem necessarily, also, to have the quality of survivorship, and both are founded upon the idea that it is a right of property, and has a determinate pecuniary value; that it vests absolutely in the widow and next of kin, and is to be distributed to them in the same proportions as the personal property of the deceased. If this is so, then it survives against the executor or administrator of the wrongdoer, by the express words of the section of the Revised Statutes above quoted. (2 R. S. 447, § 1.)

The order of the special term should therefore be affirmed with costs.

NOTE.—The *first* section of the act of 1847, would seem to govern the question whether an action for damages brought by the representatives of a person killed by wrongful act, neglect or default, *survives* against the personal representatives of the wrongdoer. That section reads as follows:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, (if death had not ensued,) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although

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the death shall have been caused under such circumstances as amount in law to felony."

The Code requires in every action, a statement of facts constituting the cause of action. The cause of action under this statute, like others, arises with the defendant, and the facts upon which it is founded, determines the nature of the action. It is conceded to be for injuries to the person, *before* the death of the party injured. Does this statute then, by giving an action to the representatives of the party injured, after his death, create a new action or remedy, which survives against the defendant? That is, does it give an action on an *implied contract*, or one in *tort* for *injury to property*? Or if the statute is to be considered as giving a new action or remedy, is it not one for *injury to the person*, and which does not survive?

Are the facts constituting the cause of action creating the defendant's liability, changed by reason of the death of the party injured? The defendant is liable to an action for damages, *notwithstanding* the death of the person injured; and his agents and employees are liable to indictment notwithstanding his death. When the defendant is sued in such an action, his whole defence would seem to be that he did not by wrongful act, neglect or default, injure the person and cause his death. Death is the result of the injuries to the person. The wrongful act, neglect or default, are the causes of such result, and consequently, it would seem, should be stated as the cause of action for the damages therefor.

The second section of the act would seem only to prescribe the mode of bringing the action, and the manner of distributing the damages when recovered. "The jury may give such damages as they shall deem a fair and just compensation, (not exceeding \$5,000,) with reference to the pecuniary injuries resulting from such death, to the wife and next of kin," &c. In other words, the court can say to the jury, that if they find the defendant liable in the action under this statute, on the facts proved, they may take into account the situation of the widow and children in settling upon the amount of damages.

This statute by its terms creates a remedy for the representatives of the party injured, (if he dies from his injuries,) against the defendant, if the action is brought within two years. Thus limiting the time of bringing the action to the same time of bringing actions which are highly penal, and to indictments—which fact goes to show, (in connection with the authority for finding an indictment for the same injury,) that the legislature intended to give speedy trials against the defendant or his agents, &c.; and it would seem to negative the idea that the action might for a series of years, like actions upon contract, run against the legal representatives of the defendant.

To the argument that the action is for the benefit of the widow and next of kin, and as they or the representatives who bring the action have received no personal injuries from the defendant, therefore the action cannot be sustained as an action for personal injuries; the answer is, that the legislature intended either to continue the same action that the deceased person might have sustained, (if living,) or they intended to give a *new and original action for personal injuries*—one by which the defendant could be made to respond in damages for the benefit of

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the widow and children, *notwithstanding* the death of the party injured, (and in that respect a remedial statute,) and founded on the personal injuries which the deceased party had sustained by the wrongful act, neglect or default of the defendant. This view of the subject would seem to harmonize all parts of the act, without any overstrained construction. (*See Beach agt. Bay State Steamboat Co., ante, page 1, which so far as it touches this question, seems to present a similar view.*)

The cases of *Doedt agt. Wiswall*, (15 How. 128;) *Quin agt. Moore*, (15 N. Y. R. 432;) *Safford agt. Drew*, (3 Duer, 827,) and the foregoing case, are all decisions adverse to the views here expressed. It would seem, therefore, mere presumption to suggest even, anything that looks like opposition to such an array of authority. But as there has been considerable discussion on the subject, and likely to be considerable more, and as some of the judges seem to think it a very proper subject for a full and free discussion, the foregoing views are suggested.—[REPORTER.

HERKIMER COUNTY COURT.

JOHN CRISTMAN, Respondent agt. RICHARD O. PAUL and others, Commissioners of Highways of the town of Wil-murt, Appellants

A defendant applying for a second adjournment in a justice's court, must bring himself within the statute, and show affirmatively and satisfactorily, that he has used due diligence to obtain the attendance of the absent witness. An affidavit alleging that the witness was not within reach of the process of the court on the day the affidavit was made, is not sufficient. If the affidavit had alleged that the witness had been out of the reach of process since the last adjournment, it would be sufficient.

A mere notice of appeal without stating any grounds upon which the appeal is founded, is not sufficient. In such a case, the justice would not be bound to make his return. And if he did make it, the appeal on motion would be dismissed. And it is not sufficient for the notice to contain "a ground of error," or "grounds of error;" but it must state truly *the* grounds, and *all* the grounds upon which the appeal is founded, or upon which the appellant relies. (*See decision to the same effect in Derby agt. Hannin, 15 How. 32.*)

It seems, that the only remedy against commissioners of highways for not repairing highways, is by indictment, except that in a proper case, they might also be proceeded against by mandamus.

If a person can, in any case, sustain an action against such commissioners for damages sustained by a road negligently and wrongfully left out of repair by

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them, it can only be when the damages sustained are special, and peculiar to the plaintiff; but it cannot be for such damages as are incident and common to all persons who may have occasion to travel on the road.

Quere. Whether in an action against commissioners of highways for damages for not repairing a highway, and in actions of this kind, it is not the same in a justice's court, as in the supreme court, that although the amount of damages claimed, (\$100,) is not put in issue, (the defendants not denying the action,) still, the amount of damages must be proved? But whether this be so or not, the defendants, by not denying, do not in any view of the case admit only such damages, as on the face of the complaint they are legally liable to pay.

JOHN C. HARRIS, *attorney for respondent.*

J. H. WOOSTER, *attorney for appellants.*

EARL, County Judge. This action was brought against the defendants for a neglect of duty, in not repairing a certain highway, in the town of Wilmurt, in consequence of which the plaintiff sustained various damages. The defendants substantially put in issue the existence of the highway, but denied nothing else alleged in the complaint. The issue was joined on the 21st day of July, 1857; and by the consent of the parties, the cause was adjourned to August 1st, on which day the parties again appeared; and the defendants applied on an affidavit of the materiality of an absent witness, for a further adjournment of the cause. This application the justice refused, and the defendants then left the court, and the trial of the cause took place in their absence. The justice rendered judgment for the plaintiff for \$75, besides costs. From this judgment the defendants have appealed to this court, and in their notice of appeal have alleged the following grounds of error, to wit:

(1.) "The court erroneously denied the application of the defendants to adjourn the cause.

(2.) "The judgment rendered in this cause is excessive.

(3.) "The judgment is against law and evidence."

I. I think the justice properly denied the application for an adjournment. The affidavit does not show the use of "due diligence" to obtain the absent witness. It alleges that

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the witness was not within reach of the process of the court on the day the affidavit was made. But for anything that appears, the witness may have been a resident of this county, and within it down to the very day when the cause was tried. It does not appear how long he was absent from the county, or that any subpoena was taken out for him, or that any efforts were made to subpoena him. I concede that the affidavit would have been sufficient, if it had alleged that he had been out of the reach of process since the last adjournment. This it does not show, and it cannot be necessarily inferred. The defendant applying for a second adjournment must bring himself within the statute, and show affirmatively and satisfactorily that he has used due diligence to obtain the attendance of the absent witness.

II. The counsel for the appellants also alleged as error on the argument in this court, that the plaintiff was improperly sworn as a witness, for the reason that no notice of his intended examination had been served on the defendants, as required by § 399 of the Code as amended.

It will not be disputed that this is an error for which the judgment must be reversed if the appellants can avail themselves of it on this appeal. The counsel for the respondent, claims that they have waived this error by not inserting it among the grounds of error in the notice of appeal.

The Code (§ 353) provides that "the appellant shall, within twenty days after judgment, serve a notice of appeal, stating *the grounds upon which the appeal is founded.*" Section 354 provides that the notice shall be served on the justice and the opposite party. Section 360 provides that the justice shall "make a return to the appellate court, of the *testimony, proceedings and judgment.*" Section 365 provides that "the appeal shall be heard on the original papers." A mere notice of appeal, without stating the grounds upon which the appeal is founded, is not sufficient. In such a case the justice would not be bound to make his return. And if he did make it, the appeal would, on motion, be dismissed. And it is not sufficient for the notice to contain "a ground of error," "or grounds

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of error;" but it must state *the grounds upon which the appeal is founded*. It cannot be said that the only object of the notice is to give the appellate court jurisdiction of the parties and the subject matter. For if this were all that was intended by the law makers, a simple notice of appeal, such as is used on appeals to the supreme court and the court of appeals, would have answered every purpose. In respect to these notices of appeals, their only office, undoubtedly, is to give the appellate courts jurisdiction. But it must be inferred that a notice of appeal from a justice's judgment which is required to contain the grounds of the appeal, has a further office to perform. When the law makers required the notice to contain "the grounds" of the appeal, they meant something. This requirement is clearly not surplusage, nor a mere idle form without purpose. In my opinion, the grounds are required to be stated for two purposes: (1.) That the justice may know the errors relied on, and thus be careful to return accurately and fully in reference to them; (2.) That the opposite party upon whom the notice is required to be served may know the errors complained of, and thus be enabled to compel by amended return, if necessary, a full and accurate return in reference to them, and that he may know beforehand the errors relied on, and thus be prepared for the argument of the appeal. It is easy to perceive that this provision, requiring the notice to contain the grounds of the appeal, is a wise and useful one in both of these aspects. Without such a provision, a party would frequently be obliged to go to the argument of the appeal without knowing what allegations of error he would have to meet, and with a return imperfect in reference to the errors alleged on the argument. In this very case, for instance, the notice of the examination of the plaintiff, may have been served, and proof of such service may have been made before the justice; and as the want of such a notice was not stated as one of the grounds of the appeal, and as the notice did not relate to the merits of the case, the justice may have omitted all mention of it in his return; and for the

same reasons, the respondent may have omitted to procure an amended return.

And if it is important and requisite that the notice of appeal should state the grounds of the appeal for the reasons above given, it is still more important that it should state all the grounds of the appeal, and state them truly. For if a party could state in his notice of appeal, some grounds, and then rely upon them and others also which were not stated; or if he could state grounds of appeal, all of which were false and untrue, and then on the argument rely upon grounds not stated, this part of the notice of appeal instead of answering a useful purpose, would only have a tendency to mislead the justice and the opposite party. I ask, then, why state the grounds of the appeal, if they are not all to be stated, and stated truly? If a party is not to state all his grounds of appeal, and state them truly, it would evidently be much better not to have them stated at all.

Hence I say the plain wording of the statute, as well as the reason upon which it is founded, requires that the appellant shall state in his notice of appeal, *the* grounds upon which he *relies*; and all the errors not fairly pointed out in the notice of appeal must be deemed to have been waived. Having placed upon the record the grounds upon which he asks to have the judgment reversed, he is estopped from taking any other grounds on the argument. He is in a position analogous to that of a party who has placed his objections to evidence, and exceptions to rulings, on certain specific grounds, and who, on a review of the objections and exceptions, is confined to the grounds thus taken.

Justice BACON, in *Webster agt. Hopkins*, (11 How. Pr. R. 140,) has arrived at a different conclusion from the one which I have here reached. He holds that the only office of the notice of appeal is to give the appellate court jurisdiction. He says, the notice of appeal "is no indispensable part of the papers upon which the appeal is to be heard in the court above; and it is no more necessary that it should appear in the printed case than the certificate of a justice of the supreme

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court, without which no judgment can be reviewed by appeal from the county to the supreme court." From these views, I must respectfully dissent. The return must contain "the testimony, *proceedings* and judgment." The notice of appeal is one of the "proceedings" in the court below. All the proceedings must be returned, and this is one of them. If the justice should omit to return it, he could and would be compelled to do so. In this respect, then, the notice of appeal differs from the certificate of a justice of the supreme court. The certificate is no part of the judgment record upon which the appeal is to be heard. The notice of appeal is a part of the return, and as such, forms a part of the judgment record in the county court.

But if I am mistaken in this, and the notice of appeal is no part of the return, it will not affect the results which I have reached; for then the party upon whom the notice of appeal has been served, can produce it on the argument, and the court can look into it and see upon what grounds of error the appellant has planted himself, and confine him to them. The court would have the same right thus to look into the notice that it would have to look into a stipulation expressly waiving all the errors except those specified in it.

Justice BACON, in the same case, also holds that the only remedy of the respondent, when he claims that the notice of appeal is defective, is by a motion to dismiss the appeal. This remedy the respondent would undoubtedly have, if the notice of appeal contained *no* grounds of error. But he would not have this remedy, if the notice of appeal contained *any* grounds. In such a case, the only remedy which he would have, would be the one which I have pointed out, to wit: to confine the appellant on the argument to such grounds as are stated in the notice of appeal.

With great respect, therefore, for the learned judge who wrote the opinion in *Webster agt. Hopkins*, I cannot be bound by it as good authority in this case. The ground of error that the plaintiff in this suit was improperly sworn as a wit-

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ness, not being found in the notice of appeal, is not available to the defendants here.

III. It is also claimed by the appellants that on the facts alleged in the complaint and proved on the trial, the plaintiff was not entitled to the judgment against them.

It is alleged in the complaint, that the defendants are commissioners of highways of the town of Wilmurt, and as such, are obligated to keep the highways and bridges in said town, in repair; that a certain highway, in said town, had been out of repair and wholly impassable, for three years; and that the defendants, although they had the means and power to repair the same, and although they had been notified and requested so to do, had wilfully, carelessly, negligently, and intentionally, neglected and refused to work and repair the same; that the said highway was the only highway leading to and from the plaintiff's farm in said town, and that by reason of the said neglect and refusal, the plaintiff had sustained great damage in his business of farming and teaming, by breaking and destroying wagons and other vehicles, injuring teams, inability to get off shingles and lumber, time and labor expended in passing to and from said farm by reason of insufficient roads, depreciation in the value of farm by reason of no road that was passable, and other injuries and damages, in all, to the amount of one hundred dollars.

All these allegations, except the existence of the highway, are not denied, and therefore admitted. On the trial, the plaintiff gave proof of the existence of the highway, and that the defendants had in their hands \$600 applicable to highway purposes; and on the subject of damages, there was no proof except the evidence of the plaintiff, which is as follows: "Said road is impassable with teams; has been so for a year and a half; the commissioners had notice of its being impassable at different times; commissioners agreed to fix said road; the last time I talked with Alvin Paul, he said he would not do anything about it; said commissioners employed me for two years to find my own way out; that time expired one year and a half last June; they paid me fifty dollars per year; it had a good

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deal of effect on me, for the reason that I could not get anything in or out, such as lumber or shingles; I broke my wagon and sleigh by reason of bad roads; had to expend a good deal of time and labor in working my way out, in consequence of the road being bad."

I am of the opinion that on the facts as alleged and proved, the plaintiff was not entitled to recover. There is no precedent to which I have been cited, or which I have been able to find, for the maintenance of such an action. If such actions are maintainable, they would have been of frequent occurrence, and many of them would have found their way into the reports; and the fact that the reports furnish no case of the kind, is all but conclusive authority, under the circumstances, that the action is not maintainable. (*See Bartlett agt. Crosier*, 17 *John*. 437; *Morey agt. The Town of Newfane*, 8 *Barb*. 645; *Hutson agt. The City of New-York*, 5 *Sandf*. 289, 319.) I think, too, from these cases, it is quite clear that the only remedy against commissioners of highways for not repairing highways, is by indictment, except that in a proper case, they might also be proceeded against by mandamus.

But if I am wrong in this view, and an individual can, in any case, sustain an action against commissioners for damages sustained by a road negligently and wrongfully left out of repair by them, it could only be when the damage sustained was special, and peculiar to the plaintiff; but it could not be for such damages as were incident and common to all persons who might have occasion to travel on the road. (*See Lansing agt. Smith*, 8 *Cow*. 146; *Butler agt. Kent*, 19 *John*. 223, 227; *The People agt. The Corporation of Albany*, 11 *Wend*. 540, 544.)

In this case, the only damage which the plaintiff can claim to be special and peculiar to himself, within the rule, is the breaking of his wagon and sleigh; and as to this, it is not alleged or proved what the amount of the damage was, and hence the recovery for it should have been merely nominal, and the judgment for \$75, cannot be sustained.

It cannot be said that the defendants, by not denying, have

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admitted the \$100 damages alleged in the complaint. I am inclined to think that in a justice's court, as well as in the supreme court, in a case of this kind, the plaintiff, although the amount of damages claimed was not put in issue, would have to prove the amount of his damages. But whether this be so or not, the defendants, by not denying, have, in any view of the case, admitted only such damages, as on the face of the complaint, they were legally liable to pay, to wit: nominal damages. The \$100 damages claimed in the complaint, was made up of items for the most of which the defendants were not, within the rule as above stated, liable.

The judgment of the justice must therefore be reversed

SUPREME COURT.

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A formal *exception* to a referee's report under an interlocutory decree, is not necessary. Where the exceptions to the evidence before the referee at the hearing are specific enough, it is not necessary to repeat them on the summing up before the referee, or at any other time.

Where the decree of the court, without expressly deciding Mrs. Everton's estate was liable for the want of reasonable care and diligence in collecting the money due upon the bond and mortgage, directed the referee to ascertain whether she failed as to her duty in that respect, and the referee having reported fully upon the point, this court confirmed the report—the referee having had full opportunity to canvass and weigh the whole evidence thereon.

New-York Special Term, April, 1858.

CLERKE, Justice. The exceptions taken to some portion of the evidence before the referee, are perhaps specific enough, as exceptions taken to evidence at the trial; it would be otherwise if they were regarded as exceptions taken to the report itself, which the old practice in references of this nature always required. But under the present system, formal exceptions to reports under interlocutory decrees are not necessary; and al-

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though the counsel has deemed it prudent to file such exceptions in this case, I regard them merely as points upon which his argument in opposition to this report is founded.

The objection therefore, that the exceptions are not sufficiently specific, does not apply in this case; the exceptions to the evidence before the referee at the hearing, were specific enough; and I do not think it was necessary to repeat the exceptions on the summing up before the referee, or at any other time.

But I do not deem the exceptions in substance, tenable. This is in effect, whatever it may be technically denominated, an action to give efficacy to a decree, in a former action between the same parties or their privies; and all proceedings, evidence, proofs and pleadings of record, and which were taken and exhibited in the one, may properly be read in the other.

With regard to the substantial merits of this very long and very complicated controversy, they have been fully passed upon by the decree of the chancellor in the former suit, and by that of Judge MITCHELL, in this, bearing date 22d March, 1854. In these decrees, it is decided that the plaintiffs were entitled to the moneys secured in the name of George B. Evertson, on the mortgage referred to, and that those who claim under Nicholas Evertson, as his legatees or next of kin, or under them, and those who claim under Mrs. Evertson or her legatees, or next of kin, or under them, are liable to refund whatever amount she received on this mortgage with interest, to the extent of what they have actually received out of the estates of Nicholas Evertson and Mrs. Evertson; and by Judge MITCHELL's decree, the referee was directed to ascertain the amount received by Mrs. Evertson on account of the said bond and mortgage, and to take an account of the principal and interest due thereon, from their date to the date of the report. The referee was also directed to inquire and report which of the defendants, if any, &c., received any portion of this amount collected by Mrs. Evertson, and how much, and whether the same was received directly as part of the money derived from the proceeds of this mortgage, or merely as part of the general

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accounts of Nicholas Evertson's estate, or of Mrs. Evertson's estate, with some specific directions as to the extent and manner of the inquiry. The decree, without expressly deciding Mrs. Evertson's estate was liable for the want of reasonable care and diligence in collecting the money due upon the bond and mortgage, directs the referee to ascertain, whether she failed as to her duty in that respect; virtually deciding or presuming that her estate, or her husband's, was liable for her neglect of due diligence. This is the only original question in the cause, which it can be supposed is left for me to decide; and on this point, I will confirm the referee's report, as well as upon all the other subjects in relation to which he was instructed to inquire. I have no reason to doubt the correctness of his conclusions. Report confirmed with costs. Before the settlement of the judgment, let some person be substituted in the place of Mr. Palmer, deceased.

SUPREME COURT.

The People ex rel. JOHN WOODWORTH agt. LORENZO BURROWS, Comptroller, &c.

There is no question but what the transaction by which a *judge* accepts the office conferred upon him by an act of the legislature, with a salary attached to the same, and impliedly undertakes the faithful performance of its duties, is a *contract* within the meaning of the constitution.

But *it seems* that the nature of this contract is such, that the legislature may, during the term of office, alter the amount of the salary from time to time, (where no prohibition is contained in the constitution,) without impairing the obligation of contract, within the meaning of the constitution of the United States.

It seems, there is no stipulation on the part of the legislature, either express or implied that they shall not alter the salary. And the appointee accepts the office with a knowledge of this power, and under an implied consent that its exercise shall be left to the decision of the legislature.

On a proceeding by *mandamus*, to compel the comptroller of the state to pay the alleged salary of a judicial officer, a defence by the comptroller that no *appropriation* has ever been made by law for the payment of such claim, as required

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by the 8th section of the 7th article of the constitution, is a conclusive answer to the application.

Albany General Term, March, 1858.

WRIGHT, GOULD and HOGEBROOM, Justices.

THIS was an appeal from an order of Mr. Justice WRIGHT, at special term, denying a motion for a peremptory mandamus. The object of the writ was to compel the comptroller to draw his warrant on the treasurer in favor of the relator, for an amount of \$3,781, alleged to be due to him from the state, for a portion of his salary as a former justice of the supreme court; and also for \$8,966 as interest upon the former sum to the first day of August, 1857. The relator's claim arose under these circumstances, as set forth in the alternative mandamus:

He was appointed a justice of the supreme court, on the 28th of March, 1819, during the existence of a law which fixed his salary at the annual sum of \$4,500, and during the existence of a constitution which fixed his term of office during good behavior, or until the age of sixty years.

This age he attained on the 12th of November, 1828. He continued to discharge the duties of his office until the 7th day of February, 1823, when he was displaced by a justice of the supreme court, appointed under the new judicial system inaugurated by the constitution of 1821, which in effect abolished the former court, and terminated the official career of the former incumbents, on the appointment of their successors. Before the adoption of this constitution, however, the legislature, by an act passed on the first of April, 1820, reduced the annual salaries of justices of the supreme court to \$3,500; and by an act passed on the 3d of April, 1821, to \$3,000. The relator claims that these attempted reductions of his salary were null and void under that clause of the constitution of the United States, which forbids any state to pass any law impairing the obligation of contracts, and therefore seeks to recover, in this form of proceeding, the difference between the sums paid under the later acts of the legislature, and that in force at the time of his original appointment. The comptroller returned to the writ of alternative mandamus,

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1. That the relator had been paid his salary in full, and that nothing was due to him.

2. That no appropriation had ever been made by law for the payment of the relator's claims, as required by the 8th section of the 7th article of the constitution.

To this return the relator demurred. The court below sustained the demurrer, and denied the motion for a peremptory mandamus, and from the order entered thereon, the relator appeals.

JOHN WOODWORTH, *in person*, and J. H. REYNOLDS,
for relator.

LYMAN TREMAIN, *Attorney-General, for defendant.*

By the court—HOGEBROOM, Justice. The learned and venerable relator has presented an argument of much ingenuity and force, in favor of the allowance of a peremptory mandamus; and it would afford the court high gratification, if, in consideration of his eminent and faithful services as a former justice of the supreme court, it were possible, consistently with the rules of law, to award the mandamus in question.

The application is based upon the supposed inability of the legislature to reduce the salary of a judge during his term of office, after it shall have been once fixed by law; and the ground of this alleged inability is, that it violates the constitution of the United States, by impairing the obligation of a contract. It is not necessary to deny, that the transaction by which a judge accepts the office conferred upon him by an act of the legislature, with a salary attached to the same, and impliedly undertakes the faithful performance of its duties, is a contract within the meaning of the constitution. The more important question is, what is the nature of the contract? What are the conditions embraced in it, and what are the limitations under which it is accepted. The legislature having fixed the compensation, have they not the right to alter it, from time to time, as the public exigencies require? Is there any absolute stipulation on their part, either expressed or im-

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plied, that they shall not do so? Does not the appointee accept the office with a knowledge of this power, and under an implied consent that its exercise shall be left to the decision of the legislature? Is the appointment in the nature of a grant upon sufficient consideration, which the legislature cannot afterwards either revoke or modify? Are there in the case vested rights which cannot be interfered with? If the office is conferred during good behavior, or for life, or until the incumbent reaches the age of sixty years, is the duration of the term beyond subsequent legislative control? Is the office itself an immortality—to endure forever? And if the legislature, or the people whom they represent, can abolish the office, can they not shorten the term, or curtail the salary? Do all public officers of every grade and description, hold their places by the same immovable tenure, and at the same unalterable compensation? If the legislature pass a law that parties in an action shall recover costs after an established rate, may they not alter it afterwards, even after suits are commenced upon the faith and expectation of receiving the stipulated compensation? Concede that after services are actually rendered by a judge under an established salary, he must receive that amount, is it an unbending rule for the future, as well as the past?

These are all questions bearing more or less upon the case in hand. The question is not without difficulty. The relator has the high authority of an *obiter dictum* of Mr. Justice STORY, of the supreme court of the United States, in the famous Dartmouth College case, in favor of his construction of the inviolability and effect of such a contract; but the case put was merely for the purpose of illustration, and is of no binding force as authority. We do not consider ourselves required to pass upon it now, there being other aspects of the case which in our view control it, and forbid the issuing of a peremptory mandamus. It is worth while, however, to notice that the convention which formed the constitution of the United States, convinced of the existence of legislative power over this subject, or else from motives of extreme caution, saw fit to incor-

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porate in that constitution, a clause that the salary of justices of the supreme court shall not be *diminished* during their term of office, and our constitution contains a clause that it shall neither be diminished nor increased during the same period.

The argument of the relator, so far as it is founded upon the supposed incompetency of the legislature to disturb judicial salaries, on the ground that it would interfere with the independence of the judiciary, strikes us as of less weight. It is aimed, not so much at the existence of the power, as the expediency of its exercise. It is an argument more properly addressed to the legislature itself, or to the people in convention, than to the courts. It would scarcely answer, we think, for judicial tribunals to overrule and annul legislative action upon considerations of so general and indefinite a character.

The independence of the judiciary is an object of the highest moment, and worthy of the most studious and patriotic efforts to secure its accomplishment; but so far as it is to be secured by placing judicial salaries above the fluctuations of party, or the appeals of partisan demagogues, it must be done, we think, by constitutional provisions, and not by judicial legislation.

It remains to consider the additional defences against this application, which are set up in the comptroller's return to the alternative writ, and which being demurred to for insufficiency, are admitted, so far as they contain allegations of fact.

The first is, that the relator's salary has been fully paid. It is difficult to see, whether this is intended as an allegation of fact or of law. If the former, then it negates the averments in the alternative mandamus, as to the non-payment of the sums therein mentioned, and is a complete defence to the application.

If the latter, then it simply presents the legal question already discussed.

The second defence interposed by the comptroller is, that no appropriation has ever been made by law for the payment of the claim, as required by the 8th section of the 7th article of the constitution. And this we regard as a conclusive answer

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to the application. The provision is general and imperative. It embraces all cases where money is sought to be drawn from the treasury of the state. It is designed as an absolute and compulsory restriction upon every disbursement upon the treasury, except under the sanction of a legislative appropriation, specifying distinctly the object to which it is to be applied, thus imposing a salutary and needed check upon the disbursement of the public funds.

We think there can be no doubt that this provision is applicable as well to claims against the state, existing prior to the constitution of 1846, as those subsequent. The reason of the rule is the same, and the mischiefs of a contrary practice are equal in either case. In the case at bar, conceding the existence of a valid claim against the state, there has been no appropriation by law for its payment, and the comptroller would be guilty of official misconduct if he should draw a warrant on the treasury in favor of the appellant.

The order of the special term, denying a peremptory mandamus, must be affirmed.

SUPREME COURT.

GRAFTON agt. REMSEN and others.

Where the complaint prayed that a deed of trust should be declared, "void, null and of no effect," and also "for such further or other relief as may be agreeable to equity and good conscience:" *Held*, that although the deed could not be declared to be void, null and of no effect, yet under the general prayer of the complaint, the court might allow it to be *reformed*. And it was reformed by inserting in it a power of *revocation*.

New-York Special Term, April, 1858.

CLERKE, Justice. Whatever may be the defects of this in-

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strument, or to whatever extent it may fail to carry out the intention of the parties to it, it is quite clear that there was no intentional misrepresentation, concealment or suppression of truth, on the part of any one connected with the transaction. Neither did the counsel who prepared the instrument fail in the exercise of professional skill, or any professional duty in the matter; the deficiencies which may be noted in the instrument arose from the want of explicit instructions, and perhaps the superabundance of suggestions from those who naturally felt an interest in the lady's welfare.

Nothing, therefore, appears which would at all justify me in setting aside or rescinding this deed. But I am very decidedly of opinion—an opinion with which I was strongly impressed, throughout the argument—that the plaintiff executed this instrument under a misapprehension as to her power to revoke it. She imagined that by not putting it on record, she could annul it, and all its provisions, by the mere physical destruction of the paper on which it was written. She was rather encouraged in this idea, and it probably was the opinion of those who seemed to concur with her on the subject. If she had consulted the gentleman whom she had employed to prepare the instrument, he would no doubt have dispelled this mistake. But she held no communication whatever with him in any stage of the proceeding.

The two important events which she contemplated, and which were then so near at hand, seem to have diverted her mind from any attention to the dry concerns of law or business. She retained the impression, however, for a considerable length of time after her return from Europe, that as the instrument was not recorded, she could rescind it any time. She therefore intended substantially that she should reserve the power of revocation; a power very frequently reserved in instruments of this description. In effect, the circumstances presented in this case, are precisely the same as if she intended that the power of revocation should be expressly inserted in the deed, and that by some misapprehension, neglect or casualty, it was omitted.

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The complaint in the first place prays, that the instrument shall be declared "void, null and of no effect." This I refuse to grant; but as it also prays "for such further or other relief as may be agreeable to equity and good conscience," I will allow it to be *reformed* by inserting in it the power of revocation; which will subserve every purpose she has in view, and, at the same time will abundantly protect the trustees and all other persons who have derived rights, or have become entitled to any interests under it. The defendants are entitled to costs. The complaint in Mr. Grafton's suit is dismissed with costs.

SUPREME COURT.

ETHAN A. GILBERT, Appellant agt. RICHARD COVELL, Respondent.

An answer which does not set up any new matter, but merely denies conclusions of law, is insufficient and frivolous. And before the amendment of § 153 of the Code, (1857) the plaintiff was not confined to his remedy by motion; he might, in all cases, *demur* to an answer for insufficiency.

But since the amendment of § 153, the plaintiff can only demur to an answer when the same contains *new matter*; leaving him to move for judgment where the answer is frivolous, or to raise the question at the trial.

Monroe General Term, December, 1857.

JOHNSON, WELLES and SMITH, *Justices.*

APPEAL from an order of special term, entered in August, 1856, overruling demurrers to 1st and 2d answers.

JOHN POMEROY, *for appellant.*

J. L. ANGLE, *for respondent.*

By the court—WELLES, Justice. The complaint is upon a

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promissory note made by the defendant to Simeon Alvord or bearer, for \$300, dated October 1, 1855, payable one day from date, with interest. The complaint, after setting out the note, states that Alvord, before the commencement of the action, "sold, transferred and delivered the said promissory note to the above named plaintiff, who is now the lawful owner and holder of said note," and then alleges non-payment, &c.

The first answer denies, upon the information and belief of the defendant, that the plaintiff is the owner or holder of the note.

In the second answer, the defendant "denies that he is, in any manner, indebted to the plaintiff upon the said note, or that he is so indebted to the amount stated in that behalf in said complaint."

The plaintiff demurs specially to each of these answers for insufficiency.

The answers are clearly insufficient. They neither of them deny any material fact stated in the complaint. The facts stated in the complaint, show a good cause of action, not one of which is denied by either answer, and therefore, on these demurrers, must be all taken as true. Neither does either answer set up new matter by way of defence or otherwise. They both consist only of denials of conclusions of law. The answers are clearly frivolous, and the plaintiff would have been entitled to judgment upon them, on motion under § 247 of the Code.

But the plaintiff was not confined to his remedy by motion. By § 153 of the Code, as amended by the act of March 3d, 1855, (*ch. 44, p. 54 of L. of 1855*), the plaintiff may, in all cases, demur to an answer for insufficiency.

If the answers are frivolous, they certainly are insufficient. But whether frivolous or not, no one can doubt their insufficiency; and even aside from the act of 1855, it was erroneous to render judgment in favor of the defendant, unless the answers were good in law. If the court at special term had been of opinion that demurrers to these answers were irregular, he should have either declined to hear them, or set them

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aside as irregular. By ordering judgment for the defendant upon them, he in effect, adjudged the answers sufficient.

The judgment of the special term should be reversed, and the plaintiff should have judgment upon the demurrers.

NORM. By section 153 of the Code, as amended in 1857, a plaintiff is now only allowed to demur to an answer, when the same contains new matter, leaving the plaintiff to move for judgment where the answer is frivolous, or to raise the question at the trial.

COURT OF APPEALS

The People *ex rel.* EDWIN SMITH, Respondents *agt.* AZARIAH C. FLAGG, Appellant.

The common council of the city of New-York, have original authority to employ on behalf of the city, a *surveyor* to furnish copies of an original map, or to make new surveys, and furnish a new map of the city, or such parts thereof, as may be required.

And where the resolution of the common council calls for a certain number of copies of a certain map, with the "alterations and additions," to that date, and a new survey and map is furnished instead, which are recognized and accepted by the common council, and agreed to be paid for by resolution, it is equivalent to an original request, and creates a just debt for the amount, against the corporation.

The 12th section of the amended charter of 1853, requiring "all work to be done, and all supplies to be furnished for the corporation, involving an expenditure of more than \$250, shall be by contract, founded on sealed bids, or on proposals made in compliance with public notice, for the full period of ten days; and all such contracts, when given, shall be given to the lowest bidder, with adequate security," does not apply to services which require in their performance *specific knowledge or professional skill*, such as the services of a lawyer, a physician, or surveyor.

By the amended charter of 1849, § 11, an executive department in the city government was constituted, denominated the "Department of Finance." It was made the duty of this department to settle and adjust all claims whatsoever, and all accounts whatsoever, in which the corporation is concerned as debtor or creditor. The comptroller was ordered to be the chief officer of this depart-

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ment. By § 18 of the amended charter of 1853, an auditing bureau in the finance department was created, with an auditor of accounts as the chief officer. This bureau, it is declared, "shall audit, revise, credit and settle all accounts in which the city is concerned as debtor or creditor." And every claim against the corporation is to be certified from the auditing bureau to the comptroller with the same allowance, and the reasons for such allowance.

Therefore, it is not within the power of the common council to determine that a particular sum is due for services and disbursements, or to require the comptroller to draw his warrant for the payment of such sum.

A city surveyor, employed by the street commissioner to make a survey, shall be paid at the rate of \$3.00 per day; and the further sum of \$1.00 per day, may be allowed for an assistant, when necessary. (*Ordinance organizing the departments of the city government*, § 229.) By the 10th section of the amended charter, (1853,) it is declared, that "no additional allowance beyond the legal claim for any service, shall ever be allowed." This ordinance and statute take from the common council, the power of making any other allowance.

Appeal from the Second Judicial District.

On the 28th of February, 1855, a resolution of the common council of the city of New-York, was approved by the mayor, directing the street commissioner to furnish each member of the common council, to the mayor's office, and to the chambers of the boards of aldermen and councilmen, a *copy of the map* of wharves and piers of the North and East rivers, as *originally drawn* by Daniel Ewen, city surveyor, and embracing the *alterations and additions to date*.

The relator was employed by the street commissioner, in April, 1855, no advertisement having been made for proposals, and no bids received for doing the work.

The relator made a *complete survey* of all the wharves and piers on the North and East rivers.

On the 26th of June, 1856, a resolution was passed by the common council, directing the comptroller of the city of New-York, (which office appellant then held,) to draw his warrant in favor of relator for \$1,250, which the appellant refused to do.

The justice sitting at the special term of the supreme court, second district, ordered a peremptory mandamus to issue against Flagg, (the appellant,) and the general term of that court affirmed the order

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MONELL, WILLARD and HOWE, *for respondents.*

R. BUSTEED and A. R. LAWRENCE, JR., *for appellant.*

By the court—COMSTOCK, Judge. The resolutions of February 28th, 1855, only called for a certain number of copies of Ewen's map of wharves and piers, with the "alterations and additions" to that date. The relator was directed by the street commissioner to comply with the requirements of that resolution; but finding that the alterations and additions were so numerous as to render necessary a new survey and map, he proceeded accordingly, and, having completed his work, furnished five hundred lithographed copies to the common council. These were accepted by them, and they passed on the 26th of June, 1856, a resolution, that he be paid for his services, the sum of \$1,250. As the case is thus far stated, I see no reason to doubt that the relator is entitled to the compensation for his labor and disbursements.

If the common council had possessed no original authority to incur a debt of this kind, their recognition of the services and of the obligation to pay therefor, would not have charged the corporation. (*Halstead agt. Mayor*, 3 *Comst.* 430; *Hodges agt. City of Buffalo*, 1 *Denio*, 110.) But no doubt is suggested that a surveyor could legally be employed on behalf of the city, either to furnish copies of an original map, or to make new surveys and furnish a new map, exhibiting the streets, squares, wharves, piers, &c. The services in this instance went beyond the original employment, but they were subsequently recognized and agreed to be paid for, in the resolution of June, 1856. This was equivalent to an original request, and created a just debt for same amount against the corporation.

The amended charter of 1853, § 12, (*Laws of 1853*, p. 412,) requires that "all work to be done, and all supplies to be furnished for the corporation, involving an expenditure of more than two hundred and fifty dollars, shall be by contract, founded on sealed bids, or on proposals made in compliance with public notice for the full period of ten days; and all such contracts, when given, shall be given to the lowest bidder,

with adequate security." It is claimed on the part of the appellant, that the services performed by the relator, should have been contracted for with the lowest bidder, pursuant to this requirement of the charter. The language of this provision is certainly somewhat broad; but I am quite well satisfied that it does not include services of the particular kind now in question. In a large sense, the term "work," may include all labor, whether mental or corporeal; but it has also a more restricted sense, which may confine it to the various kinds of manual labor, which may properly be the subject of general compensation, and can be safely awarded to the lowest bidder. It would be an unreasonable and mischievous construction of the statute, to apply it to services which require in their proper performance specific knowledge or professional skill. I do not believe that the services of a lawyer, of a physician, or those upon which the claim in the present case is founded, are embraced within the provision.

There are, however, one or two other objections, which it appears to me, should have been held fatal on the motion for a mandamus. By the amended charter of 1849, § 11 (*Stat. p. 280*), an executive department in the government of New-York city was constituted, denominated the "department of finance." It was made the duty of this department to settle and adjust all claims whatsoever, and all accounts whatsoever, in which the corporation is concerned as debtor or creditor. The comptroller was ordered to be the chief officer of this department. By § 13 of the amended charter of 1853, an auditing bureau in the finance department was created, with an auditor of accounts as the chief officer. This bureau, it is declared, "shall audit, revise, credit and settle all accounts in which the city is concerned as debtor or creditor." Every claim against the corporation is to be certified from the auditing bureau to the comptroller with the same allowance, and the reasons for such allowance. In awarding the mandamus commanding the comptroller to draw his warrant in favor of the relator for the sum claimed by him, no attention appears to have been given to these provisions of law.

It has been observed, that the resolution of the council recognizing the relator's services were equivalent to an original request that he perform those services, and bound the corporation to pay for them. But if we give any effect to the clauses in the charter which have been quoted, the comptroller could not be compelled to draw his warrant until the claim was audited, according to law. The due employment of the relator by the common council, or their recognition of his services, gave him a just claim against the corporation, and a right to have his account audited in the manner provided. But it was not within the power of the council to determine that a particular sum was due to him for his labor and disbursements, or to require the comptroller to draw his warrant for the payment of such sum. The adjustment of the amount belonged to the auditing bureau, in the department of finance, and if that department or bureau should refuse to audit it, a mandamus would be an appropriate remedy to compel them to do so. Where the claim is thus audited, it is presumed that the comptroller can be compelled by mandamus to draw his warrant for the sum allowed.

The common council appear also to have proceeded in disregard of section 229 of the ordinance organizing the departments of the city government, and of the 10th section of the amended charter of 1858. By that section of the ordinance, it was provided that a city surveyor employed by the street commissioner to make a survey, shall be paid at the rate of three dollars per day, and the further sum of one dollar per day, may be allowed for an assistant, when necessary. By the 10th section of the amended charter, it is declared that "no additional allowance beyond the legal claim for any service, shall ever be allowed." Now, the relator, as the return shows, was a city surveyor, in the surveying bureau. So far, therefore, as his account consisted of services rendered by himself or his assistants, in making the surveys of wharves and piers, the rate of compensation was fixed by the ordinance referred to, and the statute of 1858 absolutely took from the common council, the power of making any other allowance.

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The comptroller had a right to require the relator, as he did by his letter of February 2d, 1856, to make a detailed statement, showing the piers and wharves surveyed, and the time occupied in making such survey.

The demurrer to the return of the comptroller to the alternative mandamus, was not well taken. The judgment should be reversed for this reason, and the mandamus denied.

Order accordingly.

SUPREME COURT.

JOHN HOWARD MARCH agt. ALBERT LOWRY and others.

In a local action—for the foreclosure of a mortgage—the court is not expressly authorized to change the place of trial, where the county designated for that purpose in the complaint, is not the proper county. A *demand* to change the place of trial, and a consent or an order of the court thereon, are essential to change it. (*Code*, § 126.) Otherwise the trial may be had where the venue is laid.

The sale of the property to several separate purchasers, on the mortgage foreclosure in this case, was set aside, on the ground that the premises were sold much below their value. No opposition except by one purchaser, to whom was allowed terms.

New-York General Term, December, 1857.

Present, Justices MITCHELL, CLERKE and DAVIES.

MOTION on part of Albert Lowry, one of the defendants, to set aside a sale made by referee of mortgaged premises, and the judgment, on the ground of inadequacy of price which the lots brought on the sale, and also on the ground as claimed, that the judgment was void, because the place of trial was in the city and county of New-York, instead of Westchester county, where the mortgaged premises were situated. Judge ROOSEVELT at special term, had denied the motion, and an appeal was taken to the general term.

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J. W. EDMONDS, *for defendant Lowry.*

H. W. ROBINSON, *for plaintiff.*

N. RICHARDSON, *for O'Keefe, purchaser.*

By the court—MITCHELL, Justice. The action is for the foreclosure of a mortgage on lands in Westchester county. The place of trial indicated by the complaint and subsequent proceedings, is the city of New-York. After judgment, and a sale of part of the property, it is objected that the place of trial should have been in Westchester county.

The Code declares, that actions must be tried in the county in which the subject of the action, or some part thereof, is situated, (subject to the power of the court to change the place of trial.) Among other things, when the action is for the foreclosure of a mortgage on real property. (§ 123.) But it is equally explicit, that if the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant before the time for answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court, as provided in the section. (§ 126.) This section does not expressly authorize the court to change the place of trial, when the county designated for that purpose in the complaint, is not the proper county. Thus, a demand to change the place of trial, and an order of the court thereon, are essential to change the place of trial, even in local causes of action; and where the complaint does not state the proper county, the last section places the application to change the place of trial because the cause of action is local, on the same footing in one respect as when the motion is founded on the convenience of witnesses. In both cases, there must be a demand or motion to change it, and in both, there must be a consent to the change or an order of the court. The proceedings are regular in the county first selected, unless the consent to change be given, or an order of the court be made to that effect.

The application was also made to set aside the sales, on the

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ground that the property was sold much below its value. On notice to the various purchasers, none object to it but one. The defendants' affidavits tend to show, that the property sold for one-fifth of its value. The purchaser who objects, admits that what he bought, sold for less than half its value. The sale was advertised for one day, and postponed to another, by the plaintiff, on account of the extremely low prices at which sales were made. The motion to rescind the sales as to those who do not oppose, must be granted as by default; as to the other, he does not strenuously oppose, but he should receive a fair indemnity for his costs and counsel fees, and something for the loss of a bargain. Let him be paid \$250, to cover all his losses, and in lieu of the gain that he might have made, and let the property be re-advertised, the defendants also paying to the plaintiff \$10, the costs of this motion, and all the costs of the former advertisement of sale.

SUPREME COURT.

The People ex rel. THE SUPERINTENDENTS OF THE POOR OF CORTLAND COUNTY agt. R. H. DUELL, County Judge, and others, justices of Cortland County Sessions.

A defendant who is proceeded against under the statute, charged with being the father of a bastard child, cannot be sworn as a witness (although notice has been duly given) in his own behalf. Section 399 of the Code, has no application to bastardy proceedings, under our statute.

In the first place, the Code has no application to a court of sessions; nor to courts of oyer and terminer.

In the second place, § 471 of the Code, excepts from its operation special statutory remedies not before obtained by action; like the present proceedings in bastardy. The common law never gave an action against the putative father of a bastard child.

A common law *certiorari*, issued to bring up the judgment and proceeding in a case of bastardy, does not bring up for review, the evidence given upon the trial; nor the decisions as to the admission or rejection of evidence.

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Broome Special Term, February, 1858.

On the 2d day of April, 1857, two justices of the peace, of the county of Cortland, made an order of filiation, against one Eli Rummer, charged with being the father of a bastard child, then lately born.

Rummer appealed from the order to the court of sessions of Cortland county; and the case was tried on the 4th Monday in May, 1857.

The mother of the child was sworn, as a witness, in behalf of the superintendents, and testified amongst other things, that Rummer was the father of the child.

Other witnesses were sworn, and gave testimony in behalf of the superintendents.

After they rested, Rummer was offered as a witness, in his own behalf, under the 399th section of the Code, notice thereof having been duly given.

The counsel for the superintendents, objected to his being examined as a witness in his own behalf, on the grounds stated in the opinion below.

The objection was overruled, and Rummer was sworn as a witness in his own behalf, and gave testimony in the case, and testified, amongst other things, in substance, that he was not the father of the child.

After the evidence was closed, the court of sessions, quashed the order of filiation, and Rummer was discharged. And therefore the superintendents sued out a common law certiorari, directed to the said court of sessions, to which a return was made, embracing the above facts.

HORATIO BALLARD, *attorney for plaintiffs.*

M. GOODRICH, *attorney for defendants.*

MASON, Justice. The court of sessions of Cortland county, most certainly erred in allowing the defendant to be sworn in this case.

The defendant, who is proceeded against, under our statute,

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charged with being the father of a bastard child, cannot be sworn as a witness in his own behalf. The 399th section of the Code, as amended in 1857, has no application to bastardy proceedings, under our statute.

In the first place, the Code has no application to the court of sessions; and in enumerating the courts to which it is to be applied, as a code of procedure, does not name courts of sessions; and it is very clear that it has no application either to courts of sessions or oyer and terminer.

But again, by section 471 of the Code, it is provided, that "until the legislature shall otherwise provide, this act shall not affect proceedings upon mandamus, prohibition, nor appeals from surrogates' courts, nor any special statutory remedy, not heretofore obtained by action." Now, the proceedings under the statute to charge the putative father of a bastard child for its support, is a special statutory remedy, not existing at common law, and never obtained by action.

The common law never gave an action against the putative father of a bastard child. (1 *Blackstone's Com.* 458.)

This 471st section of the Code, expressly declares that the Code shall not be applied to such a case. And besides, these proceedings in bastardy are *quasi* criminal. (*Barbour's Criminal Law*, 522.)

I am without a doubt that the court of sessions erred in allowing the defendant, in this case, to swear himself clear of the charge, or to be sworn in his own behalf, and wish we had the right to correct the error on this common law certiorari.

But I am satisfied that we cannot. A common law certiorari, issued to bring up the judgment and proceedings in a case of bastardy, does not bring up for review the evidence given upon the trial, nor the decisions, as to the admission or rejection of evidence. (*The People ex rel. Shipman agt. The Overseers of the Poor of the town of Barton*, 6 *How.* 25; *The People ex rel. Orandall agt. The Overseers of the Poor of the town of Ontario*, 15 *Barb.* 286; *Haviland agt. White and White*,

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Overseers, &c., 7 How. 154; *The People ex rel. Bodine agt. Goodrich and others*, 1 Selden 568.)

The proceedings must be affirmed therefore; but, as this is a common law certiorari, no costs are given.

SARATOGA COUNTY COURT.

THE BOARD OF COMMISSIONERS OF EXCISE OF SARATOGA COUNTY, Respondents agt. JAMES DOHERTY, Appellant.

Section 13 of the act entitled, "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed April 16, 1857, reads as follows:

"Whoever shall sell any strong or spirituous liquors or wines in quantities less than five gallons at a time, without having a license therefor, granted as herein provided, shall forfeit the sum of fifty dollars for each offence."

By section one of this act, it is provided that the commissioners of excise, "shall be known as the board of commissioners of excise," &c. And section 22 of the act provides that "the penalties imposed by this act, except the penalties provided for by sections eight, fifteen and nineteen, shall be sued for and recovered in the name of the board of commissioners of excise."

Therefore an action brought to recover the forfeiture contained in section 13 is properly brought in the name of *The Board of Commissioners of Excise*.

Where the summons in such action was returned by the constable indorsed in this way: "Personally served on this 4th day of September, 1857, B. Goeway constable," *held sufficient*. It was not necessary to serve a copy of the summons unless it was demanded. And it must be presumed that the service was made in the proper county, for it was the duty of the constable to do so.

Where the summons was indorsed by the justice who issued it as follows: "This summons is issued according to the provisions of section 13 of an act entitled an act to suppress intemperance, and to regulate the sale of intoxicating liquors, passed April 16, 1857, L. G. Hoffman, Justice of the Peace;" *held*, that such indorsement was sufficient. If it is necessary to serve this indorsement (which is questionable) there is nothing requiring the constable to return that he has served it, unless the return "personally served" written on the summons, is presumed to refer to both the summons and indorsement.

Where an affidavit is made for the purpose of removing a cause from before the justice, on the ground that he is a material witness for the party; it must show that the justice is a *necessary*, as well as a material witness. And the justice has a right to judge of its sufficiency.

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A just construction of this act as a whole, requires that the commissioners shall meet, or that a majority of them, after all have been notified, shall meet, and decide to bring the actions that are directed to be brought in the name of the board, except in a single instance; and that is, where complaint has been made to them that some provision of the law has been violated, accompanied with reasonable proof of the same, and they shall neglect ten days after such complaint and proof, to prosecute, "any other person" may prosecute.

It seems, that the commissioners are entitled to pay for such services.

December Term, 1857.

ON the 10th day of September, 1857, L. G. Hoffman, Esq., Justice of the Peace of the town of Waterford, rendered a judgment in favor of the plaintiff and against the defendant, for \$50 damages, and \$1.63 costs. The defendant appeals.

S. H. FOSTER and J. I. HOUSE, *for the appellant.*

I. C. ORMSBY, *for the respondent.*

MCKEAN, County Judge. This action was brought under section 13 of the act entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed April 16, 1857, which reads thus: "Whoever shall sell any strong or spirituous liquors or wines, in quantities less than five gallons at a time, without having a license therefor, granted as herein provided, shall forfeit the sum of fifty dollars for each offence."

It is objected by the defendant's counsel, that the action should have been brought in the name of the *individuals* who compose the board of commissioners of excise, and not in the name of the board. By section one of this act, it is provided that the commissioners of excise "shall be known as the *board* of commissioners of excise," &c. Section 22 provides that the "penalties imposed by this act, except the penalties provided for by sections eight, fifteen and nineteen, shall be sued for, and recovered in *the name of the board* of commissioners of excise."

This action is therefore properly brought in that name. The fact that section 22 speaks of penalties, and section 18

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provides a forfeiture, can make no difference. The two words are used interchangeably in the act. Section 22 speaks of the "penalties provided for by sections eight, fifteen and nineteen," and yet two of those sections provide for forfeitures.

The summons was returned to the magistrate with this return upon it in writing: "Personally served on this 4th day of September, 1857. B. Goeway, constable." This was sufficient. It states the time—"4th day of September," and the manner—"personally." (2 *R. S.* 4th ed. 430, § 14; *Cow.* 418; 17 *Wend.* 517.) It was not necessary to serve a copy of the summons unless it was demanded. (See *R. S.* cited above, § 13.) It was not necessary for the constable to return that he served the summons in the county of Saratoga. But it must be presumed that he did serve it in this county, for it was his duty to do so.

The summons when issued was indorsed thus: "This summons is issued according to the provisions of section 13, of an act entitled 'An act to suppress intemperance, and to regulate the sale of intoxicating liquors, passed April 16, 1857,' L. G. Hoffman, Justice of the Peace." This indorsement was amply sufficient. (2 *R. S.* 4th ed. 723, § 7; 22 *Barb.* 137.) It is objected by the defendant's counsel that there is no proof that this indorsement was served on the defendant. If any such proof were necessary, it must, of course, come from the constable. But in the case of *Perry and Finehout* agt. *Tynen*, this court held that if it were necessary to serve the indorsement (which was questionable,) still there was nothing requiring the constable to return that he had served it, unless the return "personally served," written on the summons, referred to both the summons and indorsement; but that if such return referred to the summons only, then it must be *presumed* that the constable had done his duty with regard to the indorsement, unless he voluntarily returned what he had done with it. The judgment of this court was affirmed by the supreme court. (See 22 *Barb.* 137.)

The defendant's affidavit made with a view to removing the action from before the justice, on the ground that he was a

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material witness for the defendant, was not sufficient. It did not show the justice was a *necessary*, as well as a *material* witness. Besides, the justice "clearly had the right to judge of its sufficiency." He decided that it was insufficient. It did not clearly and indubitably show that the justice was an indispensable witness for the defendant. (*Young agt. Scott*, 3 *Hill*, 32; *Murtha agt. Walter*, 2 *Sandford*, 517.)

The "act to suppress intemperance," &c., is, in many of its provisions obscure and ambiguous. But I am satisfied that a just construction of it, in the light of established rules and principles, requires that the commissioners shall meet, or that a majority of them, after all have been notified, shall meet and decide to bring the actions that are directed to be brought in the name of the board, except in a single instance—which I shall mention hereafter.

But it need not be shown affirmatively that the commissioners, or a majority of them, have so met and conferred; it will be presumed that they have done so, unless the *defendant* shows most clearly and satisfactorily that they have not. (21 *Wend.* 178; 22 *Barb.* 187.)

Mr. Ormsby, on being examined by the defendant's counsel, said "he was not aware that the board had formally met on the subject." It was not necessary that he should be aware of it, or should know anything about it, whether parol proof was proper or not. Mr. Ormsby, without objection being made, stated that Stewart and Safford were two of the commissioners. Mr. Stewart testified that he met Mr. Safford "and conferred with him as to this prosecution." They concurred, and both of them afterwards directed Mr. Ormsby to prosecute the defendant.

There is no evidence that Mr. Lewis, the other commissioner, was not notified to meet with them, and it must be presumed that he was so notified.

In *ministerial* acts, the commissioners may act separately, after they or a majority of them, have met and concurred in the act. (22 *Barb.* 140, and cases there cited.) Therefore, any

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one of them may appear in court to conduct a prosecution, and may employ counsel to assist him or to act for him.

There is a case in which "any other person," may prosecute without a meeting of the commissioners, and that is, where complaint has been made to them, that some provision of the act has been violated, accompanied with reasonable proof of the same, and they shall neglect ten days after such complaint and proof to prosecute. (*See act, § 30.*)

It is suggested that probably the legislature did not intend that the commissioners should meet to confer in regard to prosecutions, because it made no provision for paying them for such services. But it is not uncommon that duties are imposed on public officers without any compensation. Nor is it clear that the commissioners are not entitled to pay for such services. Section 5 of the act contemplates other duties for the *board* than the granting of licenses, and fixes the compensation of each commissioner at three dollars a day *for services actually performed*. The commissioners can remain in session, *for the purpose of granting licenses*, at the place where the county courts are required to be held, only ten days. But they may meet on other days, at other places, and to discharge other duties, and I see nothing in the act depriving them of compensation therefor. However, this question is not now necessarily before me.

If the defendant had appeared before the justice and admitted the complaint, that would have authorized the justice to enter judgment in favor of the plaintiff. But the defendant appeared and demurred to the complaint. That, in law, was an admission of the facts stated in the complaint, but a denial of their sufficiency to constitute a cause of action. The cause was then submitted to the justice on those two pleadings. He very properly overruled the demurrer, and the facts being admitted, and the cause submitted, he rendered judgment for the plaintiff.

Judgment affirmed with costs.

SUPREME COURT

CHARLES D. PRICE agt. THE FORT EDWARD WATER WORKS
COMPANY.

An *affidavit* on a motion to change the place of trial for convenience of witnesses, is defective as to the materiality of the number of witnesses sworn to, if by a fair construction, the testimony must be considered merely cumulative as to a part of the witnesses named.

The affidavits should show "how the witnesses are material," within the meaning of rule 45. To do that, they should show in some sufficiently distinct manner, what facts are to be proved by the several witnesses named, specifying them, so that the court may judge of the materiality of their testimony.

New-York Special Term, March, 1857.

MOTION to change place of trial from New-York to Washington county.

S. P. NASH, *for defendants.*

A. A. PHILLIPS, *for plaintiff.*

BIRDSEYE, Justice. The affidavit on the part of the plaintiff is clearly cumulative, as to the testimony of six of his witnesses. He first states what he expects to prove by John Bad-den, and five other persons, who are practical potters, and well acquainted with the business of *manufacturing* drain pipe; that the drain pipe and other articles sold to defendants, and for which the action is brought, were of the very best quality, and the same would if properly laid down, have answered the purpose for which they were purchased by the defendants. He then adds that he expects to prove by William Mickens, and five other persons, who are well acquainted with the business of *laying* drain pipe, that the drain pipe sold to the defendants, would have worked well, and have perfectly answered the purpose of the defendants, if it had been laid down properly and in a workmanlike manner.

Price agt. The Fort Edward Water Works Company.

It is not stated in the affidavit, or claimed by counsel, that the business of manufacturing and that of laying drain pipe, are so distinct, that persons conversant only with one of them are not competent to prove all that could be proved on the point in question, by those familiar with the other. If there be any such difference between these two branches of business, it should be made affirmatively to appear.

Either one or the other of these two sets of witnesses, to prove the same fact, must therefore be rejected. And it is probable that if the testimony sought to be given is material at all, several more witnesses might be rejected from the six that will remain, without at all impairing the plaintiff's rights. Does the plaintiff ordinarily require *six* witnesses to prove that \$100 worth of goods sold, all consisting of articles precisely alike, such as drain tile, were of the first quality, unless it is at the time when he is fearful that the place of trial is about to be changed? It seems to me, that the element of distance, either present or apprehended, lends some part of the enchantment which leads him to take that view, and to swear to it.

This motion would, therefore, be granted, were not the affidavit on the part of the defendants quite as liable to criticism as that of the plaintiff, or more so. The president of the defendants, swears that they have nine material witnesses residing in Fort Edward, Washington county, and one witness residing in Saratoga county, near that place; and that the defendants expect to prove, by some of the above named witnesses, "a special agreement stated in the answer," and by "some of them," that the pipe was properly laid down; and "by some of them," that the pipe would not work at all. The affidavit goes through with the whole statement of the expected proof of the defence in this manner: It does not name any one witness, by whom any single fact is to be proved. It may be that not more than two or three of the ten persons named, know anything of the matter to be litigated. It may be by the same two or three persons, described as "some of" the ten, that the successive facts, which together make up the defence, are to be proved. For the phrase is throughout, "by

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some of them." It does not, even as to those last referred to, allude to them, as *other* than those already mentioned.

Such a statement as this, does not tend at all to show, "how the witnesses are material," within the meaning of rule 45. To do that, it should be shown in some sufficiently distinct manner, what facts were to be proved by the several witnesses named, specifying them, so that the court may judge of the materiality of their testimony.

The motion must be denied, with \$10 costs.

SUPREME COURT.

PHILIP PIKE agt. EDWIN B. NASH and another.

Where an issue in a cause is such, (examination of a long account, &c.,) that the plaintiff's attorney must know that according to the ordinary practice of the court, the cause will be *referred* by the court, and where he has been repeatedly requested by the defendant's attorney, before the circuit, to consent to a reference, the plaintiff on succeeding in the cause before the referee, is not entitled to charge for his *witnesses' fees in attending the circuit* at which the cause was referred.

A witness subpoenaed away from his residence, to attend the trial of a cause as a witness, is entitled to his travel fees, to be estimated *from his residence*. And he has a right to demand fees and receive such fees, before he can be compelled to attend.

Washington Special Term, June, 1857.

MOTION for retaxation of costs.

The cause was noticed for trial by both sides, at the September circuit, 1856, in Washington county. The action involved the examination of a long account, and was clearly referable. The defendant's attorney wrote to plaintiff's attorney, two or three weeks before the trial, proposing to refer the cause, but received no answer, and again drew his attention to it orally. The plaintiff's attorney, though not absolutely de-

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clining, did not absolutely consent, and defendant's attorney served notice of motion to refer, on the Saturday preceding the circuit, on Tuesday following. The plaintiff had subpoenaed his witnesses before this, one of whom resided in the city of New-York. The affidavit of the clerk of the plaintiff's attorney, deposed that the notice of motion, was not served in time to countermand the service of subpoenas. The witnesses actually attended one day. The cause was referred by the court.

On the hearing before the referee, a witness residing in Brooklyn, was subpoenaed at Schuylerville, and on consulting counsel was advised that he was not obliged to attend, unless he was tendered the amount of his travel fees, from his place of residence to the place of hearing at Fort Edward, and refused otherwise to attend. The plaintiff paid him his full travel fees for four hundred miles, being \$16. The clerk struck out all the witnesses' fees for attendance at September circuit, and also all the travel fees of the witness subpoenaed at Schuylerville, except for the distance to and from Fort Edward. The plaintiff moves for a re-adjustment.

H. W. NORTHUP, *for plaintiff.*

WAIT & REYNOLDS, *for defendants.*

C. L. ALLEN, Justice. The clerk was right in refusing to allow for the witnesses' fees at the circuit in September, 1856. The plaintiff's attorney knew that according to the course and practice of the court, the cause would be referred. The attorney for defendants, swears that he wrote to the plaintiff's attorney, on the 9th of September, about a fortnight before the circuit, proposing to refer, to which he received no answer; that afterwards, before serving the notice of motion, he saw the plaintiff's attorney, and stated to him, that the issues were such, that the court would probably refer the cause, whether the parties consented or not; and again proposed the reference. The attorney did not positively decline, but postponed agreeing thereto, and defendant finally served his notice of motion on the 19th of September. On the following week,

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when the circuit was held, the defendant's attorney also once proposed to refer the cause on his part, which was not at that time assented to.

Under these circumstances, it is to be presumed that the attorney well knew, that the cause would be referred; and he should have so advised his client; and not have put him to the expense of bringing his witnesses to court, when he had every reason to believe and know that the cause would not be tried.

As to the other item, I think the clerk erred in not allowing travel fees for the whole distance from the witness's place of residence. The witness, it is true, was subpoenaed at Schuylerville, where he was on business, and when he was about to return home. He insisted upon the whole amount of travel fees, from his place of residence, and refused otherwise to attend. It has been decided in this district, in a similar case, that he was entitled to it; and the plaintiff paid him the amount in good faith, and to secure his attendance before the referee. He was detained and prevented from returning home, or it may have been necessary for him to return and come back again. It is unnecessary, however, to dwell upon the question, as the decision already made, must control the present case.

The motion for adjustment must be granted, unless defendant's attorney stipulates in writing, within twenty days, that the clerk may add \$14.96, to the amount stricken out from this item, in which case, the motion is to be denied without costs to either party. Order accordingly.

SUPREME COURT.

In the Matter of the BOWERY BANK, on the Petition of A. H. NICOLAY.

The Revised Statutes provide, (1 R. S. 793,) that no conveyance, assignment or transfer, nor "any judgment suffered by any such corporation, (moneyed corporation,) when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor, over other creditors of the company, shall be valid in law."

A friendly creditor of the bank on one and the same day, presented a demand against the bank, instituted a suit upon it, had a trial and judgment, and in effect issued execution, by means of an order to show cause why the bank should not be declared insolvent, upon which no opposition was made by the bank, and it was formally declared insolvent, and a receiver appointed.

Held, that the proceeding although it may have been perfectly proper, was substantially a *voluntary assignment*, made by the bank itself, for the equal benefit of all the creditors, "according to their respective debts." And inasmuch as the assignment or judgment made or suffered, was without an intent of giving preferences, it was a proper and legal act.

The selection of one of the officers of the bank as receiver, might have been injudicious, but it certainly was not unlawful (*See* 2 R. S. 467.) Any person having an interest may immediately apply for a change of receiver, and an injunction on his acts.

A party in whose favor conditions are prescribed, may waive their enforcement. Therefore, the act of 1849, providing the *manner* in which the individual liability of stockholders of banks may be enforced, being provisions for the benefit of the bank, may be properly waived by it.

Any creditor, having a demand exceeding \$100, is authorized to make the application, (under the statute,) and to obtain the order. No notice is required, except to the bank. *It seems*, that the statute in this respect, (as to giving notice to the creditors,) is clearly defective.

New-York Special Term.

ALLEGED collusive appointment of a receiver.

MR. ANTHON, *for petition.*

MR. STOUGHTON, *opposed.*

ROOSEVELT, Justice. The petitioner, Mr. Nicolay, is a cred-

In the Matter of the Bowery Bank.

itor of the Bowery Bank, on a certified check for \$1,750, dated October 9th, 1857. He complains, in that character, of what he denominates the collusive appointment of one of the officers of the bank, as a receiver of its assets, to wind up its business, and asks that the orders which were made for that purpose, at the instance of Mr. Moody Cummings, another and a friendly creditor of the bank, may be vacated, and the appointment under them set aside.

Mr. Cummings' suit, it appears, was commenced on the 10th of October, on a check for \$250, which on that same day, had been protested for non-payment. The order to show cause, was also made on the 10th, and was returnable at 2½ o'clock, on the same day; when the counsel of the bank appearing, but making no opposition, the institution was formally declared "insolvent," the injunction against it continued, and a receiver appointed, with directions to realize the assets and "distribute their proceeds among the creditors equally and rateably, according to law." It will thus be seen, that the demand was presented, the suit upon it instituted, the trial had, the judgment rendered, and the execution in effect issued and completed, all on one and the same day. The proceeding, therefore, although it may have been perfectly proper, was substantially a voluntary assignment, made by the bank itself, for the equal benefit of all the creditors, "according to their respective debts." And the question is, is such an assignment by a bank, which, if the petitioner's allegations are well founded, "was and is solvent, and entirely able to pay its debts," in law a valid proceeding?

The statute in relation to moneyed corporations, (1 R. S. 791,) provides, that no conveyance, assignment or transfer, nor any "judgment suffered by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law."

Such a provision seems to carry with it, by necessary implication, an admission that an assignment or judgment made or suffered, without an intent of giving preferences, and of

course, still more if with the express intent of insuring equality, is a proper and legal act.

It may be, that the selection of one of its own officers as receiver was injudicious; but it certainly was not unlawful. The act for the voluntary dissolution of corporations, (2 R. S. 467,) expressly provides, that "any of the directors, trustees or other officers, or any of the stockholders, *may be* appointed receivers." We have the sanction, therefore, of the legislature, for the principle of such a selection. Any creditor, nevertheless, upon good cause shown, may object either before or after the appointment, and may designate a more suitable person of his own nomination, to take the place of the nominee of the bank. Mr. Nicolay, at present, makes no such application. It is understood, however, that another creditor has done so, and that one of my colleagues has already made the desired change, by substituting Mr. Stewart for Mr. Bradford.

It is suggested, that the new constitution of the state, and the act of 1849, passed to give effect to its requirements, have superceded the previous legislation on the subject.

The constitution declares, that the stockholders of banks of issue, shall be individually responsible to the amount of their respective shares; and the act of 1849, declares, that the liability so created, shall be enforced as therein provided, "and in no other manner." That "manner," is either by issuing an execution and showing that the property of the bank is of such a character that an execution although issued cannot be satisfied out of it, or by waiting ten days after demand and refusal, and then applying for a distribution of the assets by a receiver, and an apportionment of the deficiency among the stockholders on the report of a referee. Mr. Cummings, it is said, complied with neither of these conditions—he neither obtained an execution nor waited the ten days. A ready answer to this objection is found in the well settled principle that a party in whose favor conditions are prescribed, may waive their enforcement. The bank did so; and the order on that point, no fraud being suggested, is *res judicata*. It determined the institution to be insolvent. Mr. Nicolay, it is true, was not a

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party to the proceeding; but the statute did not require that he should be. "Any creditor having a demand exceeding one hundred dollars," was authorized to make the application, and to obtain the order. No notice was required, except to the bank. If the statute in this respect be—as it clearly is—defective, the court has no power to supply the omission. For want of notice to all the creditors, an improper person may sometimes, no doubt, be appointed receiver. The evil, however, can only be temporary. Any person having an interest may immediately apply for a change and for an intermediate injunction on his acts—and such motions may be repeated as often as new occasions for them may arise. Mr. Nicolay, therefore, is not prejudiced. And if it be true, as he alleges, that the bank is solvent, so much the better will it be for his ultimate payment.

It may nevertheless, under the circumstances, if he desires it, be proper to direct a reference to inquire into the matter of the appointment of the cashier, as distinguished from other persons, (that being the act rather of the parties, than of the court,) and of the subsequent substitution pending this proceeding, of the secretary of the Trust Company in his stead.

Should the petitioner's counsel consider a special order necessary, he will prepare a draft and submit it (on notice) for settlement.

SUPREME COURT.

MARIA F. PRATT and others agt. ORRIN P. RAMSDELL and others.

In an action for the foreclosure of a mortgage, (or any equity cases,) where tender is made before judgment, if the parties do not voluntarily adjust the costs, either party may apply to the court for that purpose.

Pratt and others agt. Ramadell and others.

If costs are allowed to the plaintiff without entry of judgment, the items and amount, are to be governed by § 307.

If the court shall be of opinion that the circumstances of the case demand it, the plaintiff may be permitted to take judgment notwithstanding the tender, and thus become entitled to the additional allowance under § 308; or, if the equities of the case demand it, the court may refuse costs to the plaintiff; or even award them to the defendant.

This course preserves the discretion of the court as to the allowance of costs in equity cases, in its full vigor, leaving it to be exercised consistently with the equities of each case. (*The case of Pratt agt. Conkey*, 15 How. 27, held to apply exclusively to actions at law.)

APPLICATION to determine the right of plaintiff to the additional allowance under section 308 of the Code, as amended by the act of April 13, 1857, in an action to foreclose a mortgage, where defendants paid the amount due with the costs specified in section 307, before judgment; the payment having been made and received under stipulation of the parties, that it should not affect the plaintiff's right to the allowance, if the court should be of opinion he was entitled to it.

N. K. HOPKINS, *for plaintiffs.*

SHERMAN S. ROGERS, *for defendants.*

DAVIS, Justice. In an action for the foreclosure of a mortgage, costs are not allowable *of course*, under section 304 of the Code, but are wholly within the discretion of the court. (*Code*, §§ 304, 306; *Gallagher agt. Eggham*, 2 Sand. S. C. R. 742.)

In cases of this kind, where the defendant is ready, and offers to pay, or brings into court the amount due on the mortgage, the parties are at liberty to apply to the court for its direction as to the question of costs; and the court under section 306 has a discretion to allow them or not, as may be equitable and just. If the court on such application do allow costs, the amount and the items are distinctly regulated by section 307, unless there be a "recovery of judgment," bringing the case as to an additional allowance within section 308. It was held in *The New-York Fire and Marine Ins. Co. agt.*

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Burrell, (9 *How. P. R.* 398,) that the statute (2 *R. S.* 553, § 20,) allowing a defendant to tender to the plaintiff or his attorney an amount sufficient to satisfy the demand with costs to the time of the tender, and providing that if it shall appear on the trial that the amount so tendered was sufficient to pay the demand and costs, the plaintiff should not be entitled to costs subsequent to the tender, is confined to actions at law, and does not affect actions for the foreclosure of mortgages. I think this conclusion a sound one; especially since in equity suits the costs being discretionary with the court, a tender of them cannot, in many cases, be made with certainty or safety to the rights of the parties.

A different rule prevails in actions coming within the provisions of section 804 of the Code. In such cases, the costs are fixed and certain; and the rights of the parties on settlement before judgment, are declared by section 822. The ruling of MARVIN, J., in *Pratt* agt. *Conkey*, (15 *How.* 27,) was in such an action, and is undoubtedly correct.

From these views, it follows that in an action for the foreclosure of a mortgage, where tender is made before judgment, if the parties do not voluntarily adjust the costs, either party may apply to the court for that purpose. If costs are allowed to the plaintiff without entry of judgment, the items and amount are to be governed by section 807. If the court shall be of opinion that the circumstances of the case demand it, the plaintiff may be permitted to take judgment notwithstanding the tender, and thus become entitled to the additional allowance under section 808; or if the equities of the case demand it, the court may refuse costs to the plaintiff; or even award them to the defendant.

This course preserves the discretion of the court as to the allowance of costs in equity cases, in its full vigor, leaving it to be exercised consistently with the equities of each case. Of course, in ordinary cases, the court, by refusing to permit judgment to be entered, would allow no more costs than the amount prescribed by section 807; and where those items had been tendered, the plaintiff would be put to show a satis-

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factory excuse for refusing them, or be himself charged with the costs of the application ; and it is so uniformly the practice of the court to allow costs in mortgage cases, that the defendant, in all ordinary cases, should tender those items to avoid the costs of the motion which the court would otherwise be likely to impose upon him. In a case of extraordinary labor or expense, the court by permitting judgment to be entered for the amount tendered, could protect the plaintiff, so far at least as the additional allowance is concerned, from the effect of a tender made upon the eve of a judgment, or after the labor and expense of contesting an unmeritorious defence.

There are no facts disclosed in the case before me, to call for the special interference of the court ; and as it appears that the costs allowed by section 307, have been paid, the motion must be denied.

NOTE. Decided at Erie special term. Affirmed on appeal November general term, 1857, DAVIS, P. J., MARVIN and GREEN, Justices, and the opinion of justice at special term adopted.

SUPERIOR COURT.

JAMES M. CROSS, respondent agt. AMOS M. SACKETT, MOSES L. HOLMES, JOHN D. MAXWELL, HENRY W. BELCHER, FRANKLIN OSGOOD, SAMUEL SMITH, ISAAC H. SMITH and NATHANIEL H. WOLFE, appellants.

There is no wrong or fraud, which directors of a joint stock company, incorporated or otherwise, can commit, which cannot be redressed by appropriate and adequate remedies.

The first mode is when the *company* in its corporate name, seeks to set aside the fraud, to reclaim abstracted property, or prevent a corporate loss.

The next mode is, when *shareholders* bring an action for the same object, unitedly or in the form which the court of chancery permits, of a bill by one or more on behalf of themselves and all others having a common interest. This right exists under various circumstances. It clearly exists, when the directors or agents

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whose deeds or omissions are impeached, do themselves control the company, and impede the assertion of a right in its own name.

And where a party projects and publicly promulgates the scheme of a joint stock company; when he causes the usual books to be opened, and allows or causes the inscription of a person as an owner of an interest to a definite amount and value therein, which is *false* within his own knowledge; when he embodies such false statements in a certificate of this right directly issued, and of the same effect as if signed by himself; when he accompanies that certificate by a written power, authorizing a transfer at large by the party to whom he has given the certificate; when that representation publicly addressed to all, induces an innocent person to advance his money, the defendant's own individual act has created a privity of contract, and he must be held responsible to any one who has been deceived. (*See also Mead agt. Maki and Jewett*, 15 How. 347.)

General Term, February, 1858.

Before BOSWORTH, HOFFMAN, SLOSSON, WOODRUFF and PIERREPONT, Justices.

UPON demurrer to complaint. Appeal from an order for judgment for the plaintiff upon a demurrer, unless the defendants answer the complaint in the time prescribed, and pay the costs.

CHARLES O'CONOR, *for defendants and appellants.*

DANIEL LORD, *for plaintiff and respondent.*

By the court—HOFFMAN, Justice. The complaint contains the following statements: That on the 13th of August, 1853, the defendant Holmes, entered into a written agreement with the defendants *Sackett, Maxwell, Belcher, Osgood and Samuel Smith*, by which he sold to the last named parties, all the estates, mines, fixtures and property described and set forth in a schedule declared to be annexed.

The consideration for this sale was to be as follows: Upon the receipt of the leases described in the schedule, and delivery of the personal property therein mentioned, \$60,000 was to be paid. On the 20th of September ensuing, upon receipt of the deeds of all the estates mentioned in the schedule, conveying unquestionable titles, (except as to \$125,000 incumbrances,) the further sum of \$91,600 was to be paid; and thirty thou-

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sand shares of stock of the Gold Hill Mining Company, was also to be delivered to him.

This instrument declares, that the Gold Hill Mining Company was a company proposed to be formed upon the basis of the property therein mentioned. That property was to be divided into and represented by 200,000 shares, the par value to be five dollars a share. Fifty thousand shares were to be reserved as a capital by the company, and to provide for the payment of the \$125,000 before stated.

Holmes, then the owner of the property to be conveyed, consents to sell the whole of it for the price in cash of \$151,600; and of stock to be given him in the proposed company of thirty thousand shares, the par or arbitrary value of which was to be five dollars a share, or \$150,000. The incumbrances amounted to \$125,000. Taking the value of \$150,000 of stock, at the nominal amount, the estimate, excluding incumbrances, was \$801,600.

And the complaint alleges, that the actual value of the property did not exceed \$375,000, when wholly unincumbered, and was not worth more than \$250,000 beyond the incumbrances.

On the 30th of August, 1853, the defendants *Samuel Smith*, *Osgood* and *Holmes*, executed a certificate of organization, under the act of February 7th, 1848, for the formation of corporations for mining, mechanical and chemical purposes, as such act was amended by the statute of June 7th, 1853. The certificate stated the corporate name, the object, the capital, one million of dollars; the duration, twenty-five years, and the number of shares, two hundred thousand. The trustees for the first year were the present defendants, except the defendant *Maxwell*.

This instrument was acknowledged on the 31st of August, 1853, and filed in the office of the clerk of the county, on the 3d of September, of that year.

On the 31st of August, 1853, the defendants *Sackett*, *Maxwell*, *Osgood*, *Holmes*, *Belcher* and *S. Smith*, executed an instrument, by which they assigned to the Gold Hill Mining Company, the contract or obligation of *Holmes*, and agreed to pay *Holmes*

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all the money stipulated to be paid to him in such contract, except the \$125,000, the amount of the old incumbrances. They also agreed to deliver to Holmes the thirty thousand shares of the company. The consideration for this transfer was sixty thousand shares of the company, acknowledged to have been received, and ninety thousand shares to be delivered on or before the 20th of September ensuing.

On the same 31st of August, the defendants acting as a corporation, by the name of the Gold Hill Mining Company, accepted and agreed to the purchase, upon the terms expressed in the foregoing instrument. And on the 1st of September, 1858, Holmes executed an instrument, by which he agreed to sell and convey to the Gold Hill Mining Company, the property specified. It consists of various leases, steam engines, pumps, fixtures, &c., with certain parcels of real estate in fee. No consideration is expressed in it.

It may here be observed, that the counsel of the plaintiffs has treated the case as if there had been a company completely organized on the 31st of August, although the certificate was not filed until the 1st of September. Pausing at this stage of the facts, we find that the company had become vested with the whole of the estate and rights of Holmes, and of the five other parties, in the whole property. For this the company was bound to pay one hundred and fifty thousand shares of its stock, taking it subject to \$125,000 of old incumbrances. Holmes had the personal engagement of *Maxwell, Osgood, Sackett, Belcher and S. Smith*, to pay him \$151,600 in cash, and to deliver him thirty thousand shares of the stock of the company. Thus the property which was to cost the five parties \$151,600 in cash, and thirty thousand shares nominally \$150,000, is put into the company at \$750,000 nominal value. It is to be paid for at that estimate, and by the issue of stock.

The complaint then states, that certificates were then printed and issued by the defendants, stating that the party named was entitled to the specified number of shares in the capital stock; that such capital consisted of one million of dollars, and the shares were two hundred thousand of \$5 each. The complaint

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further states the issuing of shares of stock to the defendants at different periods, and in different amounts, in the aggregate one hundred and forty-five thousand shares. Certificates were also issued to persons other than the defendants, (except 300 to Sackett,) to the amount of nine thousand three hundred shares. The total issue was therefore \$154,600 shares. Forty-five thousand four hundred shares were reserved, and apparently under the provision that 50,000 shares were to be a capital to provide for the incumbrances of \$125,000.

The complaint proceeds to state a custom in the city of New-York, of attaching a skeleton power of attorney to certificates of stock issued by such corporations, enabling a transfer of a right to the stock to be made without an entry on the books, the knowledge by the defendants of such custom, their attaching such powers of attorney to the certificates, and that they knew and intended that such certificates would thus become easily current and negotiable as evidences of property and subjects of traffic from hand to hand, without recourse to the books of the company.

Another allegation of the complaint relates to a public declaration of dividends for two months, as out of the profits of the concern, caused to be made and published by the defendants, in order to give a fictitious value to the stock, when they well knew that the company had not received any such profits. And as to two of such dividends, it is alleged, that a large part of such dividends was paid out of money borrowed, or out of the capital stock.

The complaint then alleges, "that on the 14th of April, 1854, by means of such false and fraudulent practices and statements of the defendants, it had come to be generally believed in the city of New-York, and was believed by the plaintiff, that the said Gold Hill Mining Company was in fact possessed of property of at least one million of dollars in value; that shares and interests therein were of the value of at least \$5 a share, and that such company had earned at least the sum of \$50,000 over expenses; that the certificates issued by the defendants with the powers of attorney attached, were in circu-

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lation and course of sale, pledge and disposition, and were believed by the plaintiff to be true and genuine evidences or representatives of actual interests in a capital of one million of dollars; and so believing, and on the faith and credit of the aforesaid false and fraudulent acts and representations of the defendants, (of the falsity and fraud whereof the plaintiff was ignorant,) he did on the 14th of April, 1854, purchase of one Richard Schell, then being the holder of one of the original or substituted certificates, an interest in the said capital stock, to the extent of one thousand shares, and paid therefor the sum of \$3,500. That he received a certificate and power from Schell, which he surrendered to the company, and received in lieu thereof, from the defendants, another certificate representing the capital as aforesaid, and that the defendants transferred 1,000 shares to him on the books; that the statements and representations were false, and that the interest supposed to have been acquired by him, was, in fact, worthless; that by means of such false, fraudulent and deceptive practices of the defendants, the said plaintiff has sustained damage to the amount of \$6,000, for which he demands judgment."

Such is the substance of the case made by the plaintiff; and my first subject of inquiry shall be, what did the certificates issued by the defendants in their corporate name purport to represent? What under the statute of organization, ought they by law to have represented? and what was the truth in relation to such representations?

The representation on the certificate with its attendant power was, that the party named in it was entitled to an interest proportionate to the whole stock in a money capital, or in property equivalent substantially to a money capital, of one million of dollars. This is the statement made and uttered by the defendants, with an implied engagement for its truth, upon these instruments. And this is precisely what under their charter they were allowed and directed to represent; and they could only comply with the act of the legislature, when such was the representation, and when it was true.

The 14th section of the act of 1848, (*Sess. Laws, p. 54*), de-

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clared, that "nothing but money should be considered as payment of any part of the capital stock." The act of 1853, (*Sess. Laws*, 705,) provided, "that the trustees may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued, shall be taken as full stock." It is to be reported not as cash paid into the company, but according to the fact.

We accede to the proposition of the counsel of the plaintiff, that the legislature in substituting mines and other property for the money capital before prescribed, intended and declared that such property should have an actual value reasonably proportionate to the stock issued to pay for it. Nothing else is consistent with the honest purposes of such an association, and nothing else can have been the legislative will. But what did these certificates in truth represent? What, for example, was the fact as the complaint states it, as to the certificate of 1,000 shares purchased by the plaintiff? Instead of an interest in five thousand dollars of money, once contributed and presumed to subsist in some form of value, or in mines and property of an equal or substantially equal value, he got, what he alleges to be wholly worthless, and which upon any calculation on the statements made, must be of greatly inferior value.

We are bound to assume the allegations of this complaint to be true in all their reasonable and legal import; and if so, a case is presented of the formation of a bubble company, contrived for purposes of private emolument, its authors and managers fraudulently publishing statements tending to produce the belief that the stock was at least of its par value; that its business had warranted successive dividends from profits; that these false and deceptive representations were made by the defendants, the authors or managers of the scheme; that they were made in such an apparent form of negotiability, as from the custom of business, was peculiarly calculated to delude and to injure; and that such delusion and injury has actually been produced and fallen upon the plaintiff, in consequence of such acts. We may here observe that some of the acts of fraud are

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stated to have been performed before the company was organized ; and as to two of the defendants, it is not said that they originally participated in them. But as to the frauds stated to have been subsequently practiced, it is to be observed that all the defendants acted together, and " did so, well knowing the premises." This is sufficient to render them as responsible by the adoption, as the others are by their performance of the acts.

The learned counsel of the defendants has pressed upon us the proposition that such a suit as this has been unknown through all the periods of the law, except when it was warranted by the statute of George 1st, (*cap.* 18, § 20, 1719,) consequent upon the South Sea bubble. He insists, " that because the common law afforded no remedy to the remote purchaser, this statute was passed, giving in the 20th section an action for damages."

He has called our attention to the history of those gigantic frauds which have acquired an immortality of pre-eminence, amid the destructive projects of the visionary or the designing, the Mississippi and the South Sea schemes. A member of Parliament when the act of George the First was discussed, admitted, " that the directors could not be reached by any known law ; but extraordinary crimes called for extraordinary remedies. The Roman lawgivers had not foreseen the possibility of a parricide, but as soon as the first monster appeared, they found a law, he was sewn in a sack and cast into the Tiber." (*Lord Mahon's History, Vol. I, p. 280.*)

But I cannot believe, that either the argument of the learned counsel, or the declamation of the rhetorician of the House of Commons is sufficient to stamp the law of England with the impotency attributed to it. On the contrary, I consider that there have always been principles of law, and tribunals adapted and competent to redress wrongs of this nature.

The act of George 1st was annulled in the 6th year of Geo. IVth, (1825.) The 19, 20 and 21st sections were recited and repealed with this declaration : " And whereas it is expedient that so much of the above act as is above set forth,

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should be repealed, and that the said undertakings, attempts, practices and acts should be adjudged and dealt with, according to the common law, notwithstanding such act. Therefore, &c."

We may assume that the Parliament thought there was some mode of dealing with such fraudulent practices, as the 20th section of the act had aimed at, according to the doctrines of the common law, and through some of the methods of redress it had supplied. In *The Charitable Corporation agt. Sutton*, (2 Atk. R. 401, 1742,) Lord HARDWICKE announced as an unquestionable principle, that a court of chancery could give relief against all who are constituted, expressly or by operation of law, trustees or agents, to parties injured by their acts.

In the case of *Hayes agt. Morgan*, (April, 1857,) I had occasion to consider the following cases: *Hitchins agt. Congreve*, (4 Russell 512;) *Walburn agt. Ingilbey*, (1 Milne & Keene, 61;) *Foss agt. Harbottle*, (2 Hare, 401;) *Dodge agt. Woolsey*, (18 How. U. S. R. 33,) and *Robinson agt. Smith*, (3 Paige, 230.) The law which may be gathered from these cases is, that there is no wrong or fraud which directors of a joint stock company, incorporated or otherwise, can commit, which cannot be redressed by appropriate and adequate remedies. The first mode is, when the company in its corporate name, seeks to set aside the fraud, to reclaim abstracted property, or prevent a corporate loss. Such is the case of *The Corporation agt. Sutton*, and the recognized rule in *Foss agt. Harbottle*. The next mode is, when shareholders bring an action for the same object, unitedly or in the form which the court of chancery permits, of a bill by one or more on behalf of themselves and all others having a common interest. This right exists under various circumstances. It clearly exists when the directors or agents whose deeds or omissions are impeached, do themselves control the company, and impede the assertion of a right in its own name.

I may particularly notice the case of *Walburn agt. Ingilbey*. It was against the directors of an incorporated joint stock company, by a holder of shares. The company was for working

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mines in Peru. The advertisement was of a capital of \$1,000,000, in 20,000 shares of \$50 each. The defendants were the original directors, and still continued to be such. The bill stated various acts by which the property of the company was abstracted and appropriated to the defendant's use. It also set forth, that the plaintiff purchased at various times, from different persons, 2,000 shares, and was the holder thereof. The bill was sustained in every point raised against it, except for not stating the manner in which the plaintiff had acquired title to shares purchased from others. The bill showed that no transfer was valid without the approval of the board. This was held to be a condition precedent, and to be stated. It was framed to get back money for the general fund.

But another question, and close to the present, arises, when an individual claims redress in his own name, solely on his own account, for a fraud practiced by a trustee or director of an association, from which he has suffered loss; when, although his claim is founded precisely upon the same facts and relations as many others, yet as his injury and loss is disconnected and peculiar, he seeks to assert his right alone.

The old case of *Colt agt. Wollaston*, (2 P. Wms. 154,) is an example of this character. The plaintiff sought by his bill to be repaid two sums of money advanced to the defendants, as managers and projectors of a bubble called The Land Security and Oil Patent, for the purpose of extracting oil from radishes. There were two plaintiffs, and they had purchased six shares each. The company was to have a capital of £100,000. The shares to be 5,000 at £20 each. Wollaston bought an estate for £31,800, which was under mortgage for £28,000, and he was to be paid £57,000 out of the fund. It was represented by the defendants to be a most advantageous project. The master of the rolls said: "This is an imposition to propose the surplus of the value of an estate, (which cost but £31,800,) after £85,000 charged upon it, more than double its value, as a security to the contributors, who laid out their money upon this project; it is giving them moonshine instead of anything real."

"It is no objection that the parties have their remedy at law, and may bring an action for money had and received; for in case of fraud, a court of equity has a concurrent jurisdiction with a court of law." The decree was for payment of the money paid, interest and costs.

In *Green agt. Barrett*, (2 *Simons Rep.* 45,) the plaintiff was a shareholder, and the defendants directors of a company called the Imperial Distillery Company. The bill was to recover a deposit of £100, which he had paid upon 20 shares allotted to him. His communications were with the secretary and bankers of the company. But a circular or prospectus had been issued by the directors, on which he much relied. The nature of the bill is thus stated by the vice-chancellor: "The prospectus of this undertaking was published, not with any intention to establish a company on the principles there stated, but as a snare to persons who might unwarily become subscribers, and for the purpose of enabling the directors to make a profit by the sale of shares, which they saw fit to assume to themselves. It appears to me the case is governed by that of *Colt agt. Wollaston*, and upon that authority, I overrule the demurrer."

In *Jones agt. Garcia Del Rio*, (1 *Tur. & Rus.* 297,) where the bill proceeded upon similar grounds of fraud, three persons filed it as shareholders, on behalf of themselves and others, to have their subscriptions returned. The case came up on an injunction, and a motion to dissolve it after answer. The answer set up, that many of the shareholders who were in the same situation as the plaintiffs, were content to abide by the contracts.

The lord chancellor said, that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill on behalf of themselves and the other holders of scrip; as they were unable to do that, they could not, having three distinct demands, file one bill. In *Blair agt. Adair*, (1 *Simons*, 87, 2 *Id.* 289,) the bill was by five persons, on behalf of themselves and numerous others, parties to an indenture, by which a large num-

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ber of shares had been assigned to the five. It was in trust, with a power of attorney to sue, obviously to avoid the difficulty of making all parties. The allegations were of a deceptive prospectus caused to be printed and published by the directors, and other acts of fraud in misapplying the deposit money, &c. The bill also showed, that some of the original shareholders had transferred their shares to others, and some of the former with the latter, united in the assignment to the plaintiffs. The vice-chancellor overruled a demurrer for want of equity, but sustained one *ore tenus* for want of parties, holding that the assignors must be on the record. The bill was then amended, and the assignment left out, and naming three other shareholders as parties, stating that they held some of the shares by original purchase, and some by transfers made to them by other shareholders. A general demurrer was taken for want of equity, and one taken *ore tenus* for want of parties.

The vice-chancellor (SHADWELL) held, that this was a case of fraud, which a court of equity could relieve as well as a court of law, and cited and approved of *Colt agt. Wollaston*. He held that the plaintiffs in their capacity as original shareholders, could sustain the bill, but not as purchasers from prior purchasers. An objection for want of parties was overruled, the bill stating that the plaintiffs did not know the names of the other shareholders. When we consider the arguments of counsel, (Mr. Sugden,) it will appear, that the objection was on the ground, that the case could not proceed without the assignors of the scrip being brought in, and upon nothing else.

The case at common law *Gerhard agt. Baley*, (20 *Eng. C. L. R.* 130,) has been much criticised by counsel. The second count in that case was sustained by the court, and when analyzed it presents this case. That the defendants and others unknown, had formed a company for the purpose of smelting and refining the ores of certain mines in Spain, and divided it into 96,000 shares of £1 each, out of which 12,000 shares were to be appropriated to the public at 12s. 6d. each, free from further calls; that such 12,000 shares were actually offered to the public: that the defendant was promoter and managing

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director, and being such, on the day of, &c., intending to defraud, deceive and injure the public, and to cause it to be publicly advertised and represented, that the company was likely to be a safe and profitable undertaking, and also to deceive the public who might become purchasers of the said 12,000 shares, and to induce them to become such purchasers, falsely, fraudulently and deceitfully, procured and caused it to be publicly made known and advertised by a certain prospectus issued by the defendant as such director, that the promoters did not hesitate to guaranty to the bearers of the 12,000 shares a minimum dividend of £33 per cent. payable half yearly, to remain in force until the 12s. 6d. a share should be paid. That the defendant by *means of such false and fraudulent pretences and representation*, after the making the same, wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer of 2,500 of the said 12,000 shares, and that he paid 12s. 6d. for each share; that in truth, the statement was false.

Lord CAMPBELL said, "that had the declaration been, that the defendant *delivered* the prospectus to the plaintiff, containing the false representation, there could be no question in the case. If the plaintiff had only averred further, that having seen the prospectus he was induced to purchase the shares, objection might be made that a connection did not sufficiently appear between the act of the plaintiff and the act of the defendant; but the count goes on to aver that the defendant by means of the said false and fraudulent representations, wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer," &c. Judgment was given for the plaintiff on this count.

I may observe that the inducement to purchase was a false representation of the defendant. *By means of* that the plaintiff was deceived, and that false representation was contained in a prospectus issued by the defendant; but as his lordship impliedly admits, *not delivered* to the plaintiff by the defendant. It appears to me, this means simply that the fact of a prospec-

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tus issued by the defendant, inducing the plaintiff to purchase, and being false and fraudulent, was enough.

In the course of the argument, Justice COLERIDGE said: "It is a continuing representation to the public, and amounts to a representation to whomsoever shall hold shares." (*See also The National Exchange Co. agt. Drew, in the House of Lords, 32 Eng. L. & Eq. Rep. p. 10.*)

The proposition of the defendants' counsel, that the action can only exist, if at all, in favor of one to whom the false and fraudulent statement has been directly made, and his reasoning to support it is similar to that of Justice SELDEN, in *The Farmers & Mechanics' Bank agt. The Butchers & Drovers' Bank*, (court of appeals, December, 1857.) He cites the cases of *Grant agt. Norway*, (1 Com. Bench R. 323;) *Coleman agt. Riches*, (29 Eng. L. & Eq. R. 323,) and *The Mechanics' Bank agt. The N. Y. & N. H. R. R. Co.*, (3 Kernan Rep. 599.) He says: "They are plainly distinguishable from the case before the court. In neither of these cases was the document upon which the question arose negotiable. It was sought there to make the principal responsible for a false representation of the agent; not (responsible) to the person to whom the representation was made, but to one with whom the agent had no dealings, and to whom he had made no representation."

But a great distinction exists between the present case and that of *The New Haven R. R. Co.*, or that of *The Farmers & Mechanics' Bank*, connected with this question of a transferred responsibility. In each of these cases the directors of the companies were wholly innocent, they were themselves the victims of a misplaced confidence. But here the instrument set forth by the directors was framed by themselves; if it was false, the falsehood was their own, and the imposition it produces must be treated as the result of their own deceptive practices. *Grant agt. Norway*, commented upon by the learned justice, is fully stated by Justice BOSWORTH and Justice COMSTOCK, in *The New-Haven R. R. case*. There the immediate holder of a bill of lading, had no right of action, the goods not being put on board the vessel. The master as agent of the owners, had

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not conferred any right of action upon the party to whom he gave the false bill of lading. So in *Colman agt. Riches*, (29 *Eng. L. & Eq. Rep.* 323,) the false receipt was given by Bond, the agent of the defendant, to Lewis, and Lewis obtained money on it from the plaintiff. It was a receipt given by the keeper of the defendant's wharf, when the goods had not been received, and the plaintiff was defeated.

It is true WILLIAMS, Justice, said: "Suppose Riches himself, had given the fraudulent receipt, would that have constituted a representation by Riches to Colman?" This seems to me the nearest approach to the proposition that the false representation of the *principal himself* to one party who could support an action, is unavailing in favor of another, to whom that party has transferred fully the subject matter of the action, in respect to which the representation was made. But as I understand the opinion of the court, this suggestion is contradicted. The court say: "There was no evidence from which it could be inferred as between Colman and Riches, (plaintiff and defendant,) that Riches agreed to give the vendee of corn, vouchers of the delivery, on which the vendee should act. Had there been such an agreement, it would have made the case very different, because Riches then would have undertaken to deliver vouchers to Colman, and to employ proper persons to give such vouchers to him. But there is no evidence of anything of the kind."

At any rate, I have come to the conclusion, that when a party projects and publicly promulgates the scheme of a joint stock company; when he causes the usual books to be opened, and allows or causes the inscription of a person as an owner of an interest to a definite amount and value therein, which is false within his own knowledge; when he embodies such false statements in a certificate of this right directly issued, and of the same effect as if signed by himself; when he accompanies that certificate by a written power, authorizing a transfer at large by the party to whom he has given the certificate; when that representation induces an innocent person to advance his money, the defendant's own individual act has created the priv-

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ity of contract which the cases referred to appear to demand, and he must be held responsible to any one who has been deceived.

The representation was publicly addressed by the defendants to all; was intended to influence all who should become apprised of it; did exercise an influence upon the plaintiff, one of the mass addressed; that influence has resulted in his damage, and the fact embodied in the representation must be treated for the present as untrue, and as meant to deceive.

We all agree that the order should be affirmed with costs.

SUPREME COURT.

JOEL HOUGHTON, and four other cases agt. GEORGE N. AULT.

On a motion to discharge an order of *attachment* issued under the Code, the defendant may read *counter affidavits* in support of his motion.

Under the Code, an attachment is not process for the commencement of an action; it is an order in the action, for the arrest of the debtor's property, in the nature of bail for the payment of such judgment as the plaintiff may obtain; it may issue in a proper case, at the time of commencing the action, or at any time afterwards. In these respects, it is entirely unlike the attachment provided by the Revised Statutes, that being the commencement of a proceeding instituted and conducted out of court, before an officer who derives his power in the matter from the statutes.

The Code, where in its provisional remedies, it uses the term *residence*, or *residence*, means *legal residence*. And legal residence means the place of a man's *fixed habitation*, where his *political rights* are to be exercised, and where he is liable to *taxation*. The idea that the word "resident," when used in the statute, means domicile, or home, or habitation in one place, and the reverse in another, is absurd. That a man may have a residence in one state to vote, and in another to exempt him from attachment, seems preposterous.

At Chambers Ogdensburgh, January, 1858.

MOTION to discharge order of attachment.

JAMES, Justice. It is conceded that the facts set forth in plaintiff's affidavit are sufficient to warrant the issuing of the order of attachment; it showed the indebtedness of the defendant upon contract, the amount due, and stated that he was not a resident of the state, but resided in Kingston, Canada West.

The defendant now moves, before the officer who granted the order, to vacate the same, and offers to read counter affidavits in support of his motion. The plaintiff objects to such affidavits being received.

Previous to the last amendment of the Code, there was considerable conflict of opinion and authority on this point. It was held, in *Conklin agt. Dutcher*, (5 *How. Pr. Rep.* 386,) that such affidavits could not be received; and that case was followed by *White agt. Featherstonhaugh*, (7 *How. Pr. Rep.* 357;) *Bank of Lansingburgh agt. McKie*, (7 *id.* 560;) *Niles agt. Vanderzee*, (14 *id.* 547;) while the converse was held in *Killian agt. Washington*, (2 *Code Rep.* 78;) *Morgan agt. Avery*, (7 *Bar.* 656;) *New-York and Erie Bank agt. Codd*, (11 *How. Pr. Rep.* 221;) *Farmer agt. Walter*, (13 *id.* 348;) and other cases.

The last legislature, in its amendment of section 241 of the Code, enacted that the defendant might, in all cases, move to discharge an attachment, as in other cases of provisional remedies. The provisional remedies given by the Code, title 7, are, arrest and bail; claim and delivery of personal property, injunction and attachment. In cases of arrest and bail, and injunction, the defendant may move to vacate the order on the original papers, or upon counter affidavits of the moving party, (*Code*, §§ 204, 205, 225;) and the amendment to section 241, was no doubt intended, and did confer upon defendants, in attachment cases, the right to use affidavits to show the impropriety of the order on a motion for its discharge.

I shall therefore hold, that the affidavits offered in behalf of the defendant are properly receivable on this motion.

The next question is, was the defendant a resident or not, within the state of New-York, at the time of issuing the attachment?

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Under the Code, an attachment is not a process for the commencement of an action; it is an order in the action, for the arrest of the debtor's property, in the nature of bail for the payment of such judgment as the plaintiff may obtain; it may issue, in a proper case, at the time of commencing the action, or at any time afterwards. In these respects, it is entirely unlike the attachment provided by the Revised Statutes, that being the commencement of a proceeding, instituted and conducted out of court, before an officer who derived his power in the matter from the statutes.

The main facts in the case are these: The defendant, a foreigner, having a family, residing in Portsmouth, in Canada, and there owning a ship yard, comes to Ogdensburgh and leases a marine railway, on the 10th of July, 1856; in that lease he covenants not to carry on ship building at any other place than the yard leased, after the expiration of six months; he enters, immediately, into the possession of the yard, and continues to carry on business there, until the issuing of this attachment on the first day of December, 1857. During this period of seventeen months, the defendant was most of the time at Ogdensburgh, his family remained at Portsmouth, keeping house. The defendant, notwithstanding his covenant in his lease, continued work in his ship yard at Portsmouth, until some time in the month of September, 1857. In the meantime, he became largely indebted at Ogdensburgh. About the time of taking his lease, he mortgaged to his lessors the timber, spike, oakum, iron, blacksmith's and shipwright's tools, shop furniture, &c., as security for the payment of certain notes to the amount of \$4,340.88. In April, 1857, he assigned his interest in his lease, and all his property as security for indorsements made and to be made. His whole indebtedness at Ogdensburgh appears to be about \$22,000, and his assets about \$5,000. He frequently represented himself as a non-resident, and stated that his property was liable to attachment; that by the terms of his lease, he was only to pay so much on the tonnage of each vessel drawn out and repaired, as rent.

Upon these facts, the defendant insists that he is a resident of the state of New-York, within the meaning of the attachment law, and that his property is not subject to arrest by order of the court.

To sustain this position, his counsel cited *Haggart agt. Morgan*, (4 Sand. 198;) *same case*, (1 Sel. 422;) *In the matter of Thompson*, (1 Wen. 45;) *Turner agt. Church*, (2 Abbott, 299;) *Bartlett agt. The City of New-York*, (5 Sand. 44.)

The case of *Haggart agt. Morgan* was an action on a bond given to release certain property seized by virtue of an attachment issued under the Revised Statutes. On the trial, the sureties offered to show that the defendant in the attachment was a resident at the time of issuing the same, by proving that his house was in the city of New-York; that he was housekeeping there at that time, and had been for many years, that his absence at New Orleans was temporary, being necessarily detained there by a lawsuit; that he had been so detained during his whole absence of three years. The court refused the offer; 1st. Because the offer showed the defendant to be a non-resident within the spirit of the act; and 2d. That giving the bond to discharge the attachment prevented him from showing such fact. At general term, the court held, 1st. That the defendant was estopped from contesting that fact of non-residence in a suit on the bond. This disposed of the case—but the judge who delivered the opinion, went on further to say: "It was well observed by the judge on the trial, that the facts offered to be proved, showed defendant a *non-resident debtor* within the meaning of the statute. He had left the state without paying this demand, and had remained abroad for three years. During all this time the plaintiffs had been *deprived of their just dues*; and it would be strange indeed, if they could not, after such a prolonged absence, make their debtor's property to respond for this debt, because he had all this time the purpose of returning to the state when it might suit his convenience. It will be observed, that this part of the opinion was wholly *obiter*—and further, that it was not claimed

or offered to be proven, that defendant had a family, but only that he kept house, within the state.

When this case came before the court of appeals, the judgment below was affirmed, and the ruling of the judge at circuit approved—both as to the estoppel and non-residence. On the latter point, the court said: "The ruling of the judge was probably correct for the reasons assigned by him. *In the matter of Thompson*, (1 *Wend.* 45,) the distinction was taken between the residence of the debtor and his *domicil*. It was there held that his residence might be abroad, within the spirit of the statute, which was intended to give a remedy to creditors whose debtors *could not be served with process*, while the domicile continued in this state. In *Frost agt. Brisbin*, (19 *Wend.* 14,) it was said in a case like the present, that actual residence without regard to the domicile of the defendant, was within the contemplation of the statute. The defendant was, therefore, a non-resident, *within these decisions*, although domiciled in New-York."

It will be seen that the court of appeals asserts no opinion of its own; it merely declares the defendant a non-resident within the decision of the cases cited. The substance of the facts in one case is set out; the other case, *Frost agt. Brisbin*, was this: "The defendant, a citizen and resident of this state, took a large stock of goods to Wisconsin, leaving his wife and child at board in this state, stating that he intended to make Milwaukee his future residence. He remained at Milwaukee ten months in business, then returned to this state on a visit, and after staying two months, was arrested and held to bail. After his arrest, he returned to Milwaukee and continued his business. Before his visit, he was appointed a commissioner, by the legislature of Wisconsin, to distribute the stock of a bank, and a director of the same. On a motion to discharge the order of arrest, the court, after reviewing and citing the various cases, and particularly that of *Thompson*, in 1 *Wend.* 45, say, "The cases cited, establish that the transient visits of a person, for a time, at a place, do not make him a resident while there. *There must be a settled fixed abode, an intention to*

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remain permanently, at least for a time *for business*, or other purposes, to constitute a residence, within the legal meaning of that term. One of the cases expressly, and all of them virtually decide, that actual residence, without regard to the domicile of the defendant, was within the contemplation of the statute. The domicile of a defendant may be in one state or territory, and his residence in another."

It will, therefore, be observed that the first case, which is made to uphold *Haggart agt. Morgan*, was held to be within the spirit of the statute, (both being commenced under the Revised Statutes), because such statute was intended to give a remedy to creditors whose debtors being absent, could not be served with process, though their domicile continued in this state; and in the second case, the defendant had no domicile—his wife and child were mere boarders in this state, his place of business being clearly established in Milwaukee, and he claiming not that he had not a residence in Wisconsin, but that his two months' stay here on a visit to his wife exempted him from arrest, under the non-imprisonment act of 1831.

The reasoning to sustain the foregoing decisions has no application to this case. This action being commenced under the Code—the attachment is not an original process; the Code has provided another means for commencing actions against absent and non-resident debtors; and although the defendant in the first case, may have been a non-resident within the meaning of the Revised Statutes, for the reason assigned—he was in fact a resident outside that statute. It is also to be observed that that decision was in furtherance of, and not to defeat, the ends of justice. So of *Frost agt. Brisbin*, it was in furtherance of justice, and was based upon facts entirely dissimilar to the case under consideration; it was but giving construction to a statute; in truth, it only decided what was the intention of the statute in exempting persons from arrest.

The case in the court of appeals being based entirely upon these two cases, so far as anything is said about residence, without expressing any opinion of its own, and the decision of such

point not being essential to the case, I cannot regard it a binding authority.

The case of *Bartlett agt. New-York City*, (5 Sand. 44,) was an application for an injunction to stay the collection of a tax assessed against the plaintiff as a resident of the city of New-York. The facts showed, that prior to May, 1849, defendant resided and kept house in New-York; he then broke up house-keeping and removed his family to Westchester county; he remained there until December, when he took rooms with his family in New-York, where he remained until April, 1850; he then returned to Westchester county, and remained until December, 1850, when he again took rooms in New-York; during all this time his only place of business was in New-York. The general act for the assessment of taxes, requires every person to be assessed in the town or ward where he resides when the assessment is made; and by the laws of 1850, when a person shall reside during any year in two or more counties or towns, his residence for the purposes, and within the meaning of the section above, shall be deemed and held to be in the county and town in which his principal business shall have been transacted. It will thus be seen that the plaintiff's liability was clear. The court, however, saw fit to examine all the cases above cited, and adopted the definition there given to the term "residence;" a conclusion not quite necessary to the decision of the case.

The next case is that of *Towner agt. Church*, (2 Abbott Pr. Rep. 299.) This case was decided at a general term of the first judicial district, in 1855. When the attachment was issued, whether under the Revised Statutes or the Code, does not appear. The facts were these: The defendant had resided with his family in New-York city, and done business there for a number of years, when he and his family removed to Connecticut, and called that their residence; but he kept rooms in the city where he boarded and lodged all the week, attending to business, (except that Sundays he spent in Connecticut.) One judge held that the defendant was not a non-resident of the state, in the sense of our attachment laws; and another

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judge held that whenever a person carried on a regular and systemized business in New-York, in which he has invested his working capital, and in such business spends his time during the regular business hours of the day, having not only his stock in trade invested there, but keeping his bank account there, and if all his ordinary transactions take place there, such person fails to come within the fair intent and meaning of our attachment laws, although his family may be actually residing in New-Jersey. That process in such case, either against the person or property, is as easily served, as against one whose family resides in the state.

This is a strong case, and more nearly in point than any other cited; and if the facts in the case under consideration came within the rule above stated, I should feel bound by that decision, although I am unable to reconcile my judgment with its broad conclusions. That a man may have a residence in one state to vote, and in another to exempt him from attachment, seems preposterous. The idea that the word "resident," when used in the statute, means domicil, or home, or habitation, in one place, and the reverse in another, is absurd. Besides, if in *Towner agt. Church*, it was an attachment under the Code, the distinction between such an attachment and one under the Revised Statutes does not seem to have been noticed. There is much more propriety in requiring a debtor, whose domicil is without the state, to give security for the debt, than one whose domicil is within. Such a debtor, pending litigation, might sell his property, and remain at home, in which event he could not be reached by any of the provisional remedies or supplementary proceedings provided by our laws.

But the facts of the latter case were entirely different from the facts in this. In that, the defendant had a fixed business and permanent residence here before he removed to Connecticut. The business remained, and was not broken up, and he himself continued with his business six days in the week; while in this case, the defendant never had a residence here—his house, domicil, family and original business, were in a foreign country, and continued there. His business here was not

of that permanent nature required in *Turner agt. Church*; it was a lease, it is true, for ten years, but there was no covenant to carry on the business that length of time; and he only had to pay, as rent, tonnage on vessels actually drawn out for repairs.

Under our former statutes, respecting attachments, where there was no other way of reaching the property of a debtor, whose domicile was in this state, but who remained abroad, a construction, that he was a non-resident, might be justified by the necessity of the case, and in furtherance of justice; but as the necessity no longer exists, that rule should be no longer followed.

But there are other decisions and definitions, on this point, than those above cited. *Burrell*, in his Law Dictionary, defines resident, as one who has a seat or settlement in a place; one who dwells, abides or lives in a place. *Bouvier*, as a person coming into a place, with intention to establish his domicile or permanent residence, and who in consequence actually remains there. *Webster*, a dwelling or having an abode in a particular place, for some time. *In the matter of Fitzgerald*, (2 *Caines*, 817,) it was held, that a person who came into the state, on a commercial adventure, without any intent of settling here, was not a resident within the meaning of the act for relief against absconding debtors. *In the matter of Wrigley*, (4 *Wend.* 602; and 8 *Wend.* 184,) Chief Justice SAVAGE, in speaking of the case of *Fitzgerald*, said, it was held, that a resident within the state, was one who had a residence of a permanent and fixed character. Chief Justice SHAW, in 1 *Metcalf*, 245, says, "the question of residence, inhabitation or domicile, although not in all respects precisely the same, they are nearly so, and depend much on the same evidence." In *Orawford agt. Wilson*, (4 *Bar.* 505,) the general term of this district, held that "the terms legal residence, inhabitation and domicile, mean the same thing; that by legal residence, they meant the place of a man's fixed habitation, where his political rights are to be exercised, and where he is liable to taxation."

The case of *Lee agt. Stanley*, (9 *How. Pr. Rep.* 272,) was a

much stronger case for the defendant, as shown by his own affidavit, than the present, and yet, the motion to discharge the attachment was denied. In that case, the defendant had actually resided, and carried on mercantile business in Franklin county, in this state, for about two years, with the honest intention of making such place his permanent residence; but he had a family, and had kept house and entertained his friends in New-Hampshire, during his whole stay in this state. The court held, that his legal residence was in the state of New-Hampshire.

In my judgment, the Code, where in its provisional remedies, it uses the term *residence* or *resident*, means *legal residence*. Within the principle of the case of *Crawford* agt. *Wilson*, as applied to the facts in this case, the defendant was not a legal resident of the state, at the time the attachment issued.

At that time, he had a fixed habitation and abode in Canada, where his family resided and kept house, and where he and they had resided and kept house, long before he came to Ogdensburgh, and where he had and did entertain his friends. He had never changed that habitation. If he ever had the intention of changing his abode, and removing his family to Ogdensburgh, of which there is great doubt, judging from the whole case, it had been abandoned some months before the attachment issued. He continued to own a marine railway, in Canada, and to carry on business there as late as last September; his letting of said railway, at that time, looked as though not made in good faith. He had other property, to a considerable amount in Canada, if credit can be given to his statements, and thus his property, his home and his family, were in Canada. Against this, is the fact, that he had done business at Ogdensburgh, for the past seventeen months, giving it his individual presence and attention; but the railway, where his business was conducted, was occupied under a lease for ten years; he was not, by said lease, compelled to carry on the business, nor to pay rent unless he did, as he only paid on the tonnage of vessels actually drawn out.

He had mortgaged all his property here, at about the time

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of his lease, and last April assigned his interest in the lease itself, together with all his property here, as collateral security for an amount which here he had no means of paying. His business might, therefore, be abandoned at any moment. He had received large sums of money for work, and left unpaid his tradesman bills, mechanics' and laborers' wages, and suffered his notes to go to protest, thus showing that his money was secreted or had been expended on his property in Canada. In his conversations, he spoke of himself as a non-resident, and his property as liable to attachment.

Under such a state of facts, I have no hesitation in saying, that the defendant's legal residence was in Canada. Neither have I any doubt, that within the fair intent and meaning of the attachment law, under the Code, the defendant was a non-resident of the state, whether such residence be termed legal or actual.

The motion for a discharge of the attachment must be denied, with \$7 costs.

NOTE.—An appeal was taken to the general term of the 4th district. And at its session, on the first Tuesday of May, 1858, the order was affirmed.

SUPREME COURT.

EDGAR W. VORIS agt. D. A. MCCREDY and P. J. ARMOUR.

This case presents a scene of fancy stock operations between a note broker doing business in the city, but residing in the country, and his family physician and neighbor, also residing in the country. The transactions seem also to have taken place in full view, and under the very brow of "Gold Hill."

The plaintiff, as he alleged, (after some luminous amplifications by defendant McCredy,) was determined "to see what there was in Gold Hill," and requested the defendant McCredy to purchase for him 500 shares of stock in "Gold Hill Mining Company," at \$3 per share, and upon which he advanced \$125 to McCredy, and gave his note for the balance; that about five months afterwards he was presented with an account from McCredy as follows: "To cash paid for Gold Hill stock, September 1, 1854, \$1,500. Interest to January 24, 145 days,

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at 7 per cent., \$42.29;" and alleged that there was no cash paid, and no such purchase made, and demanded that his advance money and note be refunded to him.

The defendants, it appeared, proved that a few days after the plaintiff made such request to purchase, the defendant McCredy purchased 500 shares of such stock in his *own name*, and for \$2.62 1-2, instead of \$3 per share, and not for cash, but on time, deliverable in "sixty days, seller's option," and not in fact delivered and paid for, till the 30th October, 1854, the last day of the option.

Held, that the defendant McCredy under such proof, could not charge the plaintiff with the price of those 500 shares, as an investment made on the plaintiff's account. Judgment to refund the money and surrender the note.

New-York Special Term, 1856.

THIS bill is filed to get rid of the consequences of an unfortunate speculation in Gold Hill stock, on the alleged ground of fraud and misrepresentation.

ROOSEVELT, Justice. The plaintiff says, that he is a practicing physician in the town of New Rochelle, and from that circumstance it is presumed, would have the court to infer, although he does not aver it in express terms, that he is not versed in the ways of the stock exchange. Whereas, the defendants, he says, although one of them, McCredy, has his residence in the country, are city note brokers doing business in Wall street. The plaintiff and the defendant McCredy, it is also alleged, were in habits of social intimacy; the former being not only the neighbor but the family physician of the latter, and as such making frequent visits, both friendly and professional to his house in the country. On one of which occasions, in a summer evening in the month of August, 1854, the conversation, it appears, turned upon the state of the stock market; and more particularly upon the probable advantage of a suggested investment or speculation in "Gold Hill Mining Company," of which McCredy said he had purchased for himself two thousand shares; the market price being three dollars per share. The doctor being thus given to understand that a pretty large operation in stock might be undertaken upon "a very small amount of money," after a few days' reflection and inquiry, and without any persuasion from McCre-

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dy, concluded to try his fortune. He accordingly provided himself with the necessary "margin," as it is termed, of one hundred and twenty-five dollars, for a purchase of five hundred shares, and paid another visit to McCredy, determined as he said, "to see what there was in this Gold Hill." McCredy at his request, took the money and undertook to make the purchase at a price not exceeding three dollars per share. "The doctor, (says the witness,) in whose presence both the conversations took place, was there at McCredy's house about an hour," discoursing among other subjects, upon golden stock prospects, and evincing a high degree of confidence in regard to them, in which McCredy fully, and I think honestly concurred. Up to this point, whatever may subsequently have been the doctor's suspicions, there is no ground whatever in the evidence for a charge of fraud. The delusion, if any, was mutual. Both parties were alike self deluded or alike deluded by others.

Subsequently, however, McCredy in repeated conversations contrary, it is alleged, to the fact, informed the doctor that he had made the desired purchase at the rate agreed upon of three dollars per share. He went further, on the 24th of January, 1855, about five months after the first interview, he presented him a written account with a charge, "to cash paid for Gold Hill stock, September 1st, \$1,500. Interest to January 24th, 145 days, at 7 per cent., \$42.29." It now appears that there was no such "cash paid," and no such purchase made. And the plaintiff, therefore, claims that the money he advanced and also a subsequent small payment, should be refunded to him, and that his note given for the balance should be delivered up to be cancelled. To this claim, it is objected by the defendant, that on the 1st of September, 1854, a few days after Dr. Voris had requested the defendant to purchase for him as already stated, five hundred shares at three dollars per share or under, he, the defendant, did in fact purchase of Morgan & Co., that number of shares. But the purchase, it appears, was in his own name and for twenty-one instead of twenty-four shillings per share, and not for cash, but on time, deliverable in "sixty

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days, seller's option," and not in fact delivered and paid for till the 30th of October, the last day of the option.

The purchase so made is clearly proved ; and the defendant alleges that it was made in execution of Dr. Voris' order—an allegation which although probably true, is not legally proved and is inconsistent with the account presented to Dr. Voris on which the note was given. And the question is, under these circumstances, can McCredy now charge the doctor with the price of those five hundred shares, as an investment made on his, the doctor's account? It seems to me, he cannot; first, because it is at least doubtful whether a purchase at sixty days "seller's option," was within the authority delegated to him; secondly, because he is estopped by his own reports, both verbal and written, of the terms of sale, from saying that the contract instead of being for "cash," was an optional one on the part of the seller as to time, and at a rate of two and five-eighths, instead of three dollars per share; and thirdly, because if not estopped from proving, he has not in fact proved, that the purchase which he made, so different from the one reported, was in truth a purchase for Dr. Voris, instead of himself, in whose name the contract was made. His answer in that respect, although duly sworn to, and although containing a very natural explanation of the transaction, is not under the present system of procedure, such evidence in his own favor, as the court can act upon. It may satisfy any mind, as it certainly does mine, that no moral wrong was intended, and that to throw the loss in this case on the defendant, when all the gain, had there been gain, would probably have gone to the plaintiff, is a great hardship; yet viewing the matter judicially, I am compelled to decide that the defence is not established. Under the circumstances, however, and in the exercise of that discretion, which in equity cases the law confers upon the court, I deem it proper not to charge the defendants with either interest or costs.

Judgment to refund the two payments, and surrender the note.

Walker, President of the Bank of Utica agt. Russell, Allen and others.

SUPREME COURT.

THOMAS WALKER, President of the Bank of Utica agt. RUSSELL, ALLEN and others.

Where several defendants appear by the same attorney, as a general rule, but one bill of costs is allowed, where the defence is substantially the same; but where it is necessary to interpose *separate answers*, the charges therefor should be allowed to the attorney.

Witnesses' fees are included in the necessary *disbursements* which the prevailing party has a right to have adjusted, and inserted in his judgment.

It does not follow that the co-defendant of a party to an action, will necessarily attend on its trial. If he does attend as a *party*, and during his attendance is examined as a *witness*, he cannot claim *witness's fees*. But if it be made to appear to the taxing officer, that such co-defendant attended solely as a *witness*, the disbursements for such witness's fees would be necessary.

Broome Special Term, April, 1858.

APPEAL from adjustment of costs.

RICHARD M. HARRINGTON, *attorney, and* GILES HOTCHKISS, *counsel for defendants.*

WARD HUNT, *for plaintiff.*

CAMPBELL, Justice. The action was brought by the president of the Bank of Utica, against a number of persons in different parts of the state, who were individual creditors of Russell & Van Valen, also defendants; the bank claiming that Russell & Van Valen were copartners, and that debts due to the bank on certain drafts drawn by Van Valen and accepted by Russell, were a joint charge upon the assets of Russell & Van Valen. Van Valen did business in his individual name, at Cortlandville, and Russell in his individual name, in the city of New-York. Russell and one of his creditors, Allen, appeared as defendants by the same attorney, though they put in separate answers. At the hearing before the referee, they examined some of these co-defendants as witnesses for them, and such co-defendants also gave evidence in their own behalf.

On the adjustment of the costs, the clerk allowed but three

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term fees, and but one bill of costs to Russell & Allen, and disallowed the charges for witnesses' fees paid to the co-defendants. The costs were adjusted in March before the amendment of the Code, and under the law in force at the time of the adjustment, but three term fees were recoverable. The clerk was right as to that item. Where defendants appear by the same attorney, as a general rule, but one bill of costs is allowed, where the defence is substantially the same; but where it is necessary to interpose separate answers, it seems to me the rule should prevail as formerly, when in such cases the attorney was allowed for the pleas of the co-defendants. In this case separate answers were put in, properly, I think, and then, as I infer, the action proceeded and testimony was taken in behalf of Russell & Allen, jointly. The attorney of these defendants should have been allowed in addition to his bill of costs in Russell's case, his charges for putting in the separate answer of Russell.

As to witnesses' fees, they are included in the necessary disbursements which the prevailing party has a right to have adjusted and inserted in his judgment. It does not follow that the co-defendant of a party to an action, will necessarily attend on its trial. If he does attend as a party, and during his attendance is examined as a witness, he cannot claim witness's fees. The law allows him no compensation for his attendance as a party, except the specific charges for trial, &c. Those charges he is entitled to, whether he appears by attorney, or whether he prosecutes or defends in person.

But if it be made to appear that such co-defendant attended solely as a witness, and not as a party, and would not otherwise have attended there as a witness, then it would be difficult to point out the difference between the disbursements to procure the attendance of the co-defendant or of any other material witness. Both disbursements would be necessary. In this case it does not appear from anything before me, that the co-defendants attended solely as witnesses. Without positive affirmative proof on this point, I think the inference should be that they attended as parties as well as witnesses. The clerk was right, therefore, in rejecting that item.

SUPREME COURT.

SAMUEL W. BASS and others agt. ANN BEAN and others.

There is no law now different from what it was before 1847, when the law in regard to the separate estate of a married woman was passed, giving her any more authority to carry on business, and contract debts now, than she had then.

In neither case are her contracts valid, so far as her liability is involved. Payment of debts contracted in regard to the separate estate of the wife, both before and after the passage of that law, was enforced against such separate estate in equity. The mere purchase of goods by a wife, because she has a separate estate, would not constitute a lien thereon. The property, if purchased by the wife, unless paid for out of her separate estate, would belong to her husband, and be liable to seizure for his debts; and he, if he sanctioned the purchase, would be liable to an action for it. (*See to the same effect Lovett agt. Robinson, 7 How. 105, and Cobine agt. St. John, 12 id. 333.*)

And the mere fact that the plaintiffs knew and so *alleged* in their complaint, that the defendant, a married woman, had personal estate, and that when they sold her the goods, they trusted her more willingly on that account, does not create any new liability on the part of the defendant.

If the plaintiffs could in any way obtain a lien for the debt on the separate estate, it could only be by the sale of property which was used for the benefit of such separate estate, or upon a direct pledge of such estate at the creation of the debt.

New-York Special Term, March, 1858.

_____ *for plaintiffs.*

_____ *for defendants.*

INGRAHAM, Justice. The plaintiffs seek to hold the defendant Ann Bean, a married woman, liable for a debt contracted by her in the purchase of goods, for the purpose of carrying on a grocery store. To take it out of the ordinary rule, they have averred in the complaint, that they sold the goods on the credit of the separate estate.

There is no law now different from what it was before 1847, when the law in regard to the separate estate of a married wo-

Beas and others agt. Bean and others.

man was passed, giving her any more authority to carry on business and contract debts now, than she had then. In neither case are her contracts valid, so far as her liability is involved. Payment of debts contracted in regard to the separate estate of the wife, both before and after the passage of that law, was enforced in equity. The mere purchase of goods by a wife, because she has a separate estate, if not required for that estate, would not constitute a lien thereon. The property, if purchased by the wife, unless paid for out of her separate estate, would belong to her husband, and be liable to seizure for his debts; and he, if he sanctioned the purchase, would be liable to an action for it.

In the present case, the plaintiffs seek to make a distinction by saying, that they sold the goods on the credit of the separate estate of the wife. I see nothing in that allegation, that alters the rule of law. The mere fact that the plaintiffs knew the defendant had personal estate, and that when he sold the goods to the married woman, he trusted her more willingly because he knew she had a separate estate, does not create any new liability. If the plaintiffs could in any way obtain a lien for the debt on the separate estate, it could only be by the sale of property which was used for the benefit of such separate estate, or upon a direct pledge of such estate at the creation of the debt. Neither of these facts are averred in this complaint, and even if the latter averment was made in reference to a debt which the law did not allow a *feme covert* to contract, I should doubt whether it could alter the liability.

The case referred to in 1 *Comstock*, 452, was for a debt for which the wife was liable before marriage, and yet the court held, that her separate estate could not be applied to its payment. *Lovett agt. Robinson*, (7 *Howard*, 105,) held that goods purchased as these were, were subject to the husband's debts, and that the act in regard to the separate estate of married women, did not affect the liability. In this case, the court says: "The doctrine contended for, would enable married women to carry on business or trade as *femes sole*, even while cohabiting with their husbands." This is not the law in this country.

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The case of *Cobine agt. St. John and others*, (12 *Howard*, 333,) holds the same doctrine. Justice BALCOM says: "The statutes of 1848 and 1849, do not authorize the wife to go into trade, and embark in commercial enterprises, as a *feme sole*. The wife has no more right to contract debts, irrespective of her separate estate, than she had before. She is still regarded as a *feme covert* as to all business transactions, outside of the management and disposition of her separate estate."

This action cannot be maintained, and judgment must be for the defendants on the demurrer, with leave to the plaintiff to amend on payment of costs.

SUPREME COURT.

ALANSON MARSH agt. J. E. BRETT and others.

A transfer of a promissory note given to an insurance company for the premium on a policy of insurance, made by the company by indorsement, without any resolution on the part of the directors, to the president of the company, to reimburse him for a loan made by him to the company, does not constitute the president a *bona fide* holder at all.

The transfer is in violation of the statute, being "a transfer not authorized by a previous resolution of the board of directors." (*See Gillett agt. Phillips*, 3 *Kern*. 116.)

A defendant sued upon such a note by the company, cannot avail himself of any alleged defects in the incorporation of the company.

New-York Circuit, April, 1857.

THE defendants gave their note to the International Insurance Company, of which the plaintiff was president, for the premium on a policy of insurance on a vessel. Subsequently, the president loaned the company some \$2,000, and without any resolution on the part of the directors, took this, with other notes, to reimburse himself. The notes, however, were regularly indorsed to him by the company. The defendants refused to pay their note on maturity, setting up illegality of transfer, and denying the legal organization of the company.

Marsh agt. Brett and others.

J. W. STEVENS, *for plaintiff.*G. DEAN, *for defendant.*

CLERKE, Justice. I do not think, that the defendants could have availed themselves of any of the alleged defects in the incorporation of the International Insurance Company, in an action commenced by the company. It would have been sufficient for them to prove the charter and the uses under it, and if the plaintiff in this action was a *bona fide* holder, he would have been entitled to recover, notwithstanding such defects. But I have as little doubt that he is not a *bona fide* holder, or rather he is not legally a holder at all, of this and other notes. *Gillett agt. Phillips*, (3 Kernan, 113,) settles the question. Marsh, the plaintiff in this action, was the president and a director of the company, and took notes, of which this was one, in the whole exceeding \$1,000, sufficient to satisfy his claim against the company, \$1,700 or \$1,800 for money therefor advanced to them.

This was clearly in violation of the statute, (1 R. S. §§ 8, 9.) It was "a transfer not authorized by a previous resolution of the board of directors," and it does not fall within the exceptional clause of the section, for the notes were not transferred to "a purchaser without notice." A president or director is presumed to be cognizant of the absence of such authority, and this will be presumed in an action brought by him against a party to the note, as well as in an action commenced against him for the recovery of the note by a receiver. Judge GARDINER, in delivering the opinion of the court in *Gillett agt. Phillips*, says, that the contract in "that case was not only unauthorized but illegal. No action could have been sustained by Phillips against the bank for the price paid by him for the note, although he had sold the notes to redeem the circulating paper of the bank. A transfer of this kind is expressly prohibited by statute, and is therefore absolutely void, and no right to or property in the thing transferred, accrues to the offending party."

Judgment for defendants with costs.

SUPREME COURT.

THE BANK OF HAVANA agt. WICKHAM and others.

An individual banker is a corporation sole. And if an individual banker is a corporation sole, he may take any corporate name he may choose, and sue in that name.

Therefore, Charles Cook, an individual banker, carrying on the business of banking at Havana, New-York, under "the act to authorize the business of banking," passed April 18th, 1838, and the several acts amending the same, in the name of "The Bank of Havana," had a legal capacity to sue in such name.

The plaintiff in this case, stated his title in the complaint in this way: "The Bank of Havana, the plaintiff in this suit," &c. The question was, whether this was a sufficient averment to show the plaintiff had legal capacity to sue? *Held*, that the plaintiff should have recited the title of the act and the date of its passage, under which proceedings were had for its incorporation, (2 R. S. 459, § 13,) as was properly decided by Judge MITCHELL, in *Johnson agt. Kemp*, (11 How. 186.)

The complaint, therefore, showed on its face, that the plaintiff had not legal capacity to sue, and for this cause was *demurrable*. (11 How. 216.) And as the defendants took no objection by demurrer or answer, that the plaintiff had not legal capacity to sue, by sections 147 and 148 of the Code, they are deemed to have waived the same.

Had it been necessary to set forth in the complaint that the plaintiff was a corporation, to have made the complaint "state facts sufficient to constitute a cause of action," then the defendants could have taken advantage of the defect in the complaint upon the trial. (Code, § 148.) But the capacity of the plaintiff to sue, has been held to be independent of the cause of action. (11 How. 216.)

The complaint in this case, however, did state facts sufficient to constitute a cause of action. By the Revised Statutes, (2 R. S. 458, § 3,) which is still in force, it is provided, "In suits brought by a corporation created by or under any statute of this state, it shall not be necessary to prove on the trial of the cause, the existence of such corporation, unless the defendant shall have pleaded in abatement or in bar, that the plaintiffs are not a corporation. Therefore, to put the plaintiff to proof of such fact, the defence of *nul tiel corporation* must be set up by answer.

Broome General Term, 1858.

APPEAL from judgment at special term.

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The Bank of Havana agt. Wickham and others.

SAMUEL A. FOOT, *for plaintiff.*DANIEL RUMSEY, *for defendants.*

By the court—BALCOM, Justice. "The Bank of Havana," is the name in which Charles Cook, an individual banker, carries on the business of banking at Havana, New-York, under "the act to authorize the business of banking," passed April 18th, 1838, and the several acts amending the same. The certificate of the superintendent of the bank department, that was given in evidence upon the trial, states that Cook commenced the banking business as an individual banker, at Havana, in 1851, under the aforesaid acts. Is the plaintiff a corporation? The appellant's counsel contends the plaintiff is not a corporation, and that it has no legal capacity to sue. It is now well settled that banking associations, formed under the aforesaid acts, are moneyed corporations. (*Gilbert agt. Moody, 3 Comstock, 479.*) By chapter 340 of the laws of 1848, individual bankers are declared to be "banks of discount and deposit, as well as of circulation," and every report directed to be made by any law, from an individual banker, must be verified by the oath of the president and cashier. The term *association* is made to include every individual doing business alone for some purposes under the banking laws. (*Chap. 437, Laws of 1849.*) After a careful examination of the statutes authorizing and regulating the business of banking, I have come to the conclusion that an *individual banker* is a "corporation sole." There is no express declaration in any statute to this effect, but individual bankers are clothed by statute with legal capacities and advantages which as natural persons by common law they could not have; and "no particular form of words is requisite to create a corporation." (2 *Kent's Com.* 276.) Kent says: "A corporation sole consists of a single person, who is made a body corporate and politic, to give him some legal capacities and advantages, and especially that of perpetuity, which as a natural person he could not have; a bishop, dean, parson and vicar, are given in the English books as instances of sole corporations." Perpetuity is not absolutely necessary to make an association

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or a single person a corporation. The existence of a corporation may be limited to any number of years. Therefore, what Kent says about perpetuity being a legal capacity or advantage possessed by an individual, when a corporation sole, has no controlling force. The statute prohibiting individual bankers from selling or transferring the business upon the securities deposited by them, was not passed until after the action was tried. (*Laws of 1854, p. 554, § 9.*) "As a general rule, a fee will not pass to a corporation sole without the word successors, and it will continue for the life only of the individual clothed with the corporate character." (2 *Kent's Com.* 273; 2 *Blackstone's Com.* 431.) This was the common law rule, but it has been changed by statute in this state. (1 *R. S.* 748, § 1; *Nicoll agt. The New-York and Erie Railroad Company*, 2 *Kernan*, 121.)

If an individual banker is a corporation sole, there can be no more objection to such banker taking any corporate name he shall choose to adopt, or to Mr. Cook being a corporation by the name of "The Bank of Havana," than there is to an individual being a corporation by the name of bishop, dean, parson or vicar, which, as has been seen, is allowable under the English law. If these are correct conclusions, the proof established the plaintiff's legal capacity to sue; and this action was properly brought in the name by which Mr. Cook transacts his banking business. There was no necessity for bringing it in Mr. Cook's name as president of the Bank of Havana. (*The People agt. The Assessors of Watertown*, 1 *Hill*, 621; *Gilbert agt. Moody*, 3 *Comstock*, 483; *Con. art.* 8, § 3; 1 *R. S.* 599, § 1; *The East River Bank agt. Judah*, 10 *How. Pr. Rep.* 135.)

But suppose the proof failed to establish that the plaintiff is a corporation—the question arises, was the judge right in holding that the appellants by not denying in their answers the corporate capacity of the plaintiff to sue, thereby admitted such capacity? This would clearly be so had there been a direct allegation in the complaint that the plaintiff was a corporation. (*Code*, § 168.)

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The only statement in the complaint, aside from the title of the action which imports that the plaintiff is a corporation, is in these words, viz: "The Bank of Havana, the plaintiff in this suit." Is this a sufficient averment to show the plaintiff has legal capacity to sue? The Revised Statutes provide that "in actions by or against any corporation, by or under any law of this state, it shall not be necessary to recite the act or acts of incorporation, or the proceedings by which such corporation was created, or to set forth the substance thereof, but the same may be pleaded by reciting the title of such act, and the date of its passage." (2 R. S. 459, § 13.) Section 471 of the Code, declares that the second part of the Code, which prescribes the manner of pleading in actions, shall not affect "any statutory provisions relating to actions not inconsistent with this act, and in substance applicable to the actions hereby provided."

Mr. Justice MITCHELL has held that "banks created under the general banking law, when suing, should recite the title of the act and the date of its passage, under which proceedings were had for its incorporation." (*Johnson, President, &c. agt. Kemp*, 11 How. Pr. Rep. 186. See also *Bank of Louisville agt. Edwards*, 11 How. Pr. Rep. 216.) And I am of the opinion Justice MITCHELL has given the correct construction to this enactment, when the question is properly raised by demurrer. (See *Onondaga County Bank agt. Carr*, 7 Wendell, 443.) Now assuming that the complaint in this action should have recited the title of the act, and the date of its passage under which the plaintiff claims to have a legal existence, then the complaint upon its face does not show that the plaintiff has legal capacity to sue; and as section 144 of the Code has been construed, the complaint shows upon its face that the plaintiff had *not* legal capacity to sue, and for this cause was demurrable. (11 How. Pr. Rep. 186; *Id.* 216.) This construction of section 144 of the Code, is probably based upon the assumption that the complaint is presumed to show all the legal capacity to sue that a plaintiff has; and, therefore, when such legal capacity to sue does not appear from the complaint, it is deemed to show

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affirmatively that the plaintiff does not possess any legal capacity to sue.

By the same authorities, the complaint in this action was not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. (11 *How. Pr. Rep.* 216.) But it could have been objected to by demurrer, for the reason that it appears upon the face that the plaintiff has not legal capacity to sue. (*Code*, § 144, *sub. 2*, 11 *How. Pr. Rep.* 186; *id.* 216.) As the appellants took no objection by demurrer or answer, that the plaintiff has not legal capacity to sue, by sections 147 and 148 of the Code, they are "deemed to have waived the same." Had it, however, been necessary to set forth in the complaint that the plaintiff is a corporation, to make the complaint "state facts sufficient to constitute a cause of action," then the defendant could have taken advantage of the defect in the complaint upon the trial. (*Code*, § 148.) But the capacity of the plaintiff to sue, has been held to be independent of the cause of action. (11 *How. Pr. Rep.* 216.)

Again, if the decision in *The Bank of Lowville agt. Edwards*, (11 *How. Pr. Rep.* 216,) is to be upheld, the complaint in this action states facts sufficient to constitute a cause of action. Although it does not recite the title of the act and the date of its passage, under which proceedings were had for the plaintiff's incorporation; upon this assumption it was not necessary for the plaintiff to prove its corporate existence on the trial. Prior to the Revised Statutes such proof was necessary when the general issue alone was pleaded. (8 *J. R.* 378; 2 *Cowen*, 778; 7 *Wend.* 540.) But by such statutes, it is provided, "in a suit brought by a corporation created by or under any statute of this state, it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall have pleaded in abatement or in bar, that the plaintiffs are not a corporation. (2 *R. S.* 458, § 3.) This statute is still in force and it is applicable to actions under the Code. (*Code*, § 471.) Had the appellants in their answers denied each and every allegation in the complaint, the plaintiff would not have been obliged to show its corporate existence. "To put the

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plaintiff to proof of that fact, the defence of *nul tiel corporation* must be set up by answer." The case of *The proprietors of the common and undivided land and meadows of Southold agt. Horton*, (6 *Hill*, 501,) relied upon by the appellants' counsel, does not establish a different proposition. That was an ejectment suit, in which, by the statute then in force, a defendant might demur to the declaration or "plead the general issue only." (2 *R. S.* 806, § 22; 17 *Wend.* 443; 1 *Denio*, 452.)

There is sufficient unexceptionable evidence in the case to sustain the finding of the justice upon the questions of fact. The judgment of the special term should, therefore, be affirmed with costs.

SUPREME COURT.

THOMAS T. FERRIS agt. FRANCIS FERRIS and others.

Where a principal sum of money secured by a bond and mortgage, is made payable at a future period, with semi-annual interest thereon, and in default of payment of interest in thirty days from the day it becomes due and payable, the whole principal sum shall then become due and payable;

Held, that it is a contract agreed upon by the parties, and if from the mere negligence of the mortgagor in performing his contract, he suffers the whole debt to become due and payable, according to the terms of the mortgage, no court will interfere to relieve him from the payment thereof, according to the conditions of his own agreement;

Held, that the case of *Broderick agt. Smith*, (15 *How.* 434,) can hardly be considered as deciding the contrary in a case free from trick or oppressive conduct.

New-York Special Term, June, 1858.

INGRAHAM, Justice. IN this case the plaintiff seeks to foreclose a mortgage where the interest has remained unpaid for more than thirty days, and the principal was made payable in

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1859, with the condition that it should become payable immediately after the expiration of the said thirty days.

The answer sets up that Mary Rafael, the present owner of the premises, bought the same as part of her separate estate; that her husband has the management of her affairs; that he has been absent for some months; that she is ignorant of business, and that no demand has been made of such interest. The defendant also states that she has paid into court the interest, and interest thereon, and costs, and asks that the complaint may be dismissed with costs from the time of the answer. To this answer the plaintiff demurs.

Upon the argument of this case, I supposed I was concluded by the decision of the general term in *Broderick et al. agt. Smith*, (15 *How. Pr. Rep.* 434,) but on examining that case, I find that the plaintiff was bound to have a judgment which was a lien on the premises removed, which was not done until after the interest became due, and then no notice was given of the removal of the incumbrance.

Mr. Justice CLERKE, in delivering the opinion of the court says: "I think it was contrary to all equitable dealing for the plaintiff to take advantage of these circumstances, instead of apprising the defendants of the cancelment (of the judgment.)"
* * This was oppressive and unreasonable conduct on the part of the plaintiffs."

This can hardly be considered as deciding that in a case free from any trick or oppressive conduct, a plaintiff having a bond and mortgage on which payment of the interest had been neglected for thirty days, may not collect the principal if the defendant brings the amount of the interest and costs into court.

Without expressing any opinion as to the merits of the case of *Broderick agt. Smith*, above cited, I feel at liberty to examine the questions in this case as not affected thereby.

The contract made between the parties was for the payment of the principal sum on the 15th of June, 1859, with interest payable half-yearly, and if the interest was not paid within thirty days after it was payable, then the principal sum should be payable immediately thereafter. The question naturally arises,

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whether this court, without any other cause than an excuse from the defendant for neglecting to comply with the conditions of the contract, can alter the terms of it without the consent of the parties. That the court may correct errors in a contract, or reform it to make it conformable to the agreement between the parties, is undoubted, but no such mistake is alleged here.

The contract is as the parties agreed. The plaintiff takes the bond and mortgage, with the agreement of the mortgagor to pay the interest at a fixed time, and to pay the principal within thirty days thereafter, if the interest is not paid. What right has any court to say that it is oppressive or unconscionable in a plaintiff to claim the payment of the money which belongs to him on the day when the parties agreed it should be paid? I exclude from the consideration of this question any inquiry as to the power of a court of equity to interfere where fraud has been used to postpone the payment of the interest, because no fraud is alleged here. The only difference is, that the defendant being unacquainted with business, suffered the day of payment to arrive sooner, in consequence of her own negligence, than she would otherwise have done. Is the plaintiff in the wrong for this neglect? or has he done anything by which a court would be authorized to interfere or change the conditions on which he loaned his money and took the bond and mortgage as security?

In *Noyes agt. Clark* (7 *Paige's Ch. Rep.* p. 179,) the chancellor says: "The parties had unquestionable right to make the extension of credit dependent upon the punctual payment of the interest at the times fixed for the purpose; and if from the mere negligence of the mortgagor in performing his contract, he suffers the whole debt to become due and payable according to the terms of the mortgage, no court will interfere to relieve him from the payment thereof according to the conditions of his own agreement." (*Steel agt. Bradfield*, 4 *Taunt.* 127; 5 *Barn. and Adolphus*, p. 40; *Gerolett agt. Hanforth*, 2 *Wm. Bl.* 958; 3 *Burrows*, 870.)

It is urged that there is a forfeiture, and equity will always relieve a party against it. But it is a mistake to say that there is

any forfeiture. The plaintiff's claim is for the money secured by the bond and interest. There is nothing more claimed. The debtor owes the amount; he forfeits nothing; he is required to pay nothing but his debt; there is no forfeiture to be relieved. If the bond had been conditioned to pay the money in one year, with an agreement to extend the payment a second year if the interest was paid within thirty days after it became due, no one would for a moment argue that there was any forfeiture. And yet that condition and the condition of the bond in suit are substantially the same. Nor can it be called a penalty. That is a sum named as damages, to be recovered for violating an agreement or promise in lieu of damages. There is no such thing here. No damages are called for. Merely altering the day of payment is neither a forfeiture of any property, nor a penalty in damages for the breach of any agreement. I have been referred by the defendants to the case of *Mayo agt. Judah*, (5 *Mumford*, 494,) in which the court held that it was a forfeiture, because it imposed further and greater obligation upon the parties. I do not so consider it in this case, and unless there is something in the act of assembly under which that case arose allowing it, I must dissent from that conclusion. The same remarks apply to the cause cited from 2 *White and Tudor, Eq. Cases*, p. 468.

In the second and third districts, I am informed, decisions have been made adverse to the right of the defendant to relief in similar cases to the present. My opinion is, that the plaintiff is entitled to judgment, and reference is ordered to H. E. Davies, Esq., to compute the amount due on the mortgage, &c.

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SUPREME COURT.

The People agt. THE LONG ISLAND RAILROAD COMPANY.—
Six indictments for alleged public nuisance.

The People agt. THE BROOKLYN AND JAMAICA RAILROAD
COMPANY.—Three indictments for the same offence.

The defendants in these cases, two railroad companies, were indicted for a *public nuisance* in running their engines and cars through Atlantic street, and through a tunnel in Atlantic street, in the city of Brooklyn, New-York.

The defendants moved to change the *place of trial* from the county of Kings, on the ground that there was a strong and controlling excitement against the defendants upon the principal question involved in these controversies in the city of Brooklyn, caused principally by those who had been instrumental in procuring the indictments;

Held, that if the objection to the jurors extended no further than to the residents of Brooklyn, and if it prevailed generally as to them, but not to those residing in the other towns in the county, it was enough to call upon the court to change the place of trial. Because, comparatively the number of jurors from the other towns in the county must be very small, the population of Brooklyn being 205,250, while that of the other towns was 11,105.

Held, also, that the several facts stated to show that there was a strong excitement and a hostile feeling against the defendants, in reference to the charges of nuisance contained in the indictments, prevailing extensively, not only among the residents along Atlantic street, but extending through the entire city, was sufficient to authorize the court to order the place of trial to be changed. It was accordingly changed to the county of Westchester.

Brooklyn General Term, 1858.

J. M. VAN COTT, *for the people.*

JOHN DIKEMAN and J. GREENWOOD, *for L. I. R. R. Co.*

S. C. LYON, *for Brooklyn and Jamaica R. R. Co.*

By the court—S. B. STRONG, Justice. The defendants have moved that the place of trial in these actions should be changed, on the ground that a fair and impartial trial cannot

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be had in the county of Kings, where the indictments were found, and the facts upon which they are based occurred. There are reasons for which I would gladly have abstained from expressing an opinion upon the motion, but they are not such as to legally disqualify or exonerate me from participating in the decision, and as my views differ to some extent from those expressed by one of my brethren, I conceive that I am bound to state them.

It is of course, desirable that trials in criminal cases should be had where the offences are alleged to have been perpetrated. Witnesses for the prosecution often attend reluctantly, and generally without compensation, and if they should be called upon to travel far from their homes, they would be subjected to great hardship, or would abstain from attending, to the great obstruction of public justice. I do not, however, urge that the vicinage, as it is called, is the best adapted for a fair and impartial trial. There is often some personal feeling or local prejudice, which sadly interferes with the due and impartial administration of justice, and sometimes induces strange verdicts, or what is becoming a serious evil, final disagreements among the jurors. But for the trouble, delay and expense, caused by trials at distant or remote places, it would be well that they should take place before jurors to whom the parties, their interests and their feelings are unknown. It might sometimes subserve the ends of justice that the parties and their witnesses are personally known to the jurors, but the advantage is more than balanced by the undue influence of personal or local considerations, which is often imperceptible to him whom it controls.

A party who moves to change the place of trial from where the law primarily establishes it, must fail unless he satisfies the court that the ends of justice require, or at all events will be promoted by it. That a fair and impartial trial by any means within the reach of the law cannot be had in the county where the venue is laid, is undoubtedly a sufficient reason for the change. The people, all men, whatever may be their character or standing, have when litigating, a right to a trial by an

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unprejudiced jury. Many unbiassed and competent jurors can be found in any county of this state in any conceivable case, but the question in these applications is, whether such can be procured by the methods provided by law? Ordinarily there are no means of selection. The requisite number is drawn from the county box, and the persons named on the ballots must be summoned whether competent and unbiassed or otherwise. Even when select jurors are ordered, the county clerk names forty-eight, and neither party has any voice in the matter except to strike out twelve of the number. Where there is a widely extended bias, its application to individuals cannot be well known until they are interrogated, and therefore these methods of obtaining impartial jurors are very imperfect.

Still the court should not lightly adopt or act upon the opinion that a fair and impartial trial cannot be had in the county where the events which gave rise to the complaint are alleged to have happened. Facts, and not the mere impressions and conclusions of the parties or their witnesses, should be considered and should control. Parties generally, and their friends frequently, imbibe strong opinions from inconsiderable causes, and it is unsafe to place much reliance upon them. But there cannot well be any serious misapprehension as to the existence of facts, especially when they are of a public nature. The principal question is as to the inferences to be drawn from them.

It was said in *Messinger agt. Holmes*, (12 Wend. 203,) that the place of trial should not be changed by reason of popular excitement or prejudice, until after an ineffectual trial in the county where the venue had been originally laid. But in a subsequent case, (*The People agt. Webb*, 1 Hill, 179,) it was decided that the venue might be changed in a criminal case where the evidence of public excitement against the applicant was strong, although there had been no actual experiment made by way of trying the cause, or even impannelling a jury in the county where it had been originally laid. The learned judge who gave the opinion of the court in that case, remarked, and I think correctly, "To make such an experiment essential would

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seem to be quite dangerous. It is the very thing which the law seeks to avoid when it is seen that the party may, and probably will, be drawn into a trial by a jury who, under an influence of which they themselves may be hardly conscious, an influence which perhaps no human sagacity can detect, may pronounce a verdict against him, and conclude his rights forever." True, in a case where a verdict is palpably against the weight of evidence a new trial may now be granted, but the evil of even an unjust conviction cannot be easily cured. The character of an innocent man may suffer, and he may be subjected to great trouble and expense. The venue was changed in the case of *The People* agt. *Webb*, in consequence of an excitement against the prosecutor, created by publications from the office of the defendant. The case was by no means as strong as this is represented to be, although there is a considerable resemblance in the minor features. There was another decision of the late supreme court, which was not reported, by which the venue in several actions, which I (as a member of the bar) had instituted against the Long Island Railroad Company, was changed from the county of Suffolk by reason of alleged prejudices against the company, to the county of Richmond, although there had been no attempt to try either of them. The objection that there had been no trial was strenuously urged in those cases, but it was unhesitatingly overruled. In a case where there had been an actual experiment and a failure to obtain a just verdict clearly traceable to undue excitement against the unsuccessful party, that would go far to show that a trial should be had elsewhere. Even a failure to obtain any verdict is not, however, conclusive evidence, when attributable to popular excitement, that it prevails to such an extent as to require a change of the place of trial, as was decided in the case of *The People* agt. *Bodine*, (7 Hill, 181.) In that case, however, there was an actual necessity for the change, as subsequent attempts to try the defendant in Richmond county and in the adjoining county of New-York proved ineffectual. In the late case of *The People* agt. *Baker*, where I changed the place of trial on an indictment for murder, al-

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though I referred to two unsuccessful trials in the county where the venue was laid, yet I relied much more upon the causes and other evidence of popular excitement. I do not understand Judge PARKER as repudiating, in the late case of *The People agt. Wright*, (5 How. Pr. Rep. 28,) the doctrine of the late supreme court in *The People agt. Webb*, and the later cases to which I have alluded. He says, that an actual unsuccessful experiment is not the only admissible proof to sustain the allegation of undue bias in the county where the venue is laid. He does indeed refer to the case of *The People agt. Webb*, as the only one cited or which he had found, in which a change of venue had been granted, on the ground of excitement without a previous attempt to impanel a jury. But he canvasses the proof in the case before him very closely, and relies upon its insufficiency to show the fact as the ground of his decision, which would have been unnecessary if the technical objection had been fatal.

The main allegation in the case under consideration, is, that there is a strong and controlling excitement against the defendants, upon the principal question involved in these controversies, in the city of Brooklyn, caused principally by those who have been instrumental in procuring the indictments. It is not averred, or so far as the papers go, even supposed, that it prevails in the rural parts of the county. According to the census of 1855, the population of the city of Brooklyn was 205,250, while that of the other towns in the county was 11,105. Comparatively the number of jurors from the rural districts must be very small. In an ordinary panel there would not probably be enough to constitute a single jury. Even if a jury could be selected from the county, there could not be more than one from the entire panel, and the other cases would have to be tried by Brooklyn jurors or go over to another term. If, therefore, the objection to the jurors extends no further than to the residents of Brooklyn, still if it prevails generally as to them, it is enough to call upon us to change the place of trial. Several facts have been stated to show that there is a strong excitement, and a hostile feeling

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against the defendants, in reference to the charges of nuisances contained in the indictments, prevailing extensively not only among the residents along Atlantic street, but extending through the entire city. Before any action by the common council against the defendants, meetings of the inhabitants were called by hand-bills and notices posted up in many public places in the city and in the ferry-boats. In some of them there were such expressions as the following: "Odious railroad monopoly," "running the filthy manure cars," "obstructing the street with a tunnel," "tremble tyrants when you read the doctrines of our insatiable rights," "they have usurped possession of the streets without any legal right," "this locomotive nuisance," "the people cannot be silenced forever," "its locomotive rushes wildly on, destroying all before it! the victims! the victims!" "only thirteen Irishmen and one Dutchman have been killed by this railroad," "the widows and orphans, who can depict the result in widows and orphans?" "the widows and orphans by this road since it crossed our street," "the railroad insists upon running the locomotives in our streets regardless of life blood! blood! more blood!" One of the meetings was called to consider, "why South Brooklyn should be destroyed by nuisances?" "Why this railroad is suffered to run over, mangle and kill citizens, without conscience?" "Why horses and vehicles are run down, crushed and destroyed in our streets, without compensation?" It appears from one of the papers submitted to us, that at one of the meetings called by a public advertisement, to which, according to a statement in one of the affidavits, several thousand names were subscribed, and held in the large hall at the Athenaeum, every seat in the hall was filled, and that the president and three of the vice-presidents were ex-mayors of the city, and there were twenty-seven other vice-presidents, among whom were many gentlemen of high standing and extensive influence; an application was made to the common council to abate the alleged nuisance. The matter was referred to a committee, which held several meetings in a large room, which was closely crowded. The audience was disorderly, and ac-

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According to the affidavits presented by the defendants, many, and according to the affidavits in behalf of the prosecution, a few of the spectators hissed when the counsel for the defendants were addressing the committee. A report was made decidedly unfavorable to the defendants, and the common council, in accordance with the report, adopted a resolution condemning the use of Atlantic street by the defendants as a public nuisance. There was no statement of the votes of the members of the common council, among the papers presented to us, but a majority of the aldermen, representing a large part of the entire city, must have concurred in the condemnation. The report of the committee and the concurrent ordinance of the common council were extensively published in the city papers. Subsequently, complaints were made to a grand jury, composed doubtless, principally of inhabitants of the city of Brooklyn, and the same grand jury found six indictments against the Long Island Railroad Company, and three indictments against the Brooklyn and Jamaica Railroad Company. Why so many indictments were found for the same offence, for the road is actually used only by one of the companies, was not explained to us. Among the papers presented to us, is the copy of a petition signed by thirty-five persons, containing strong representations against the conduct of the defendants, which was addressed to the grand jury, and is said to have been received by them. This was all wrong, and would, if properly noticed, have gone far to vitiate the indictments. At the late state election, the candidates in Brooklyn for the two seats in the Senate, and the seven seats in the Assembly, were catechized by a committee, upon the subject of allowing the defendants to continue the alleged nuisance, and all avowed their opposition to it. These and such as these, are the facts presented to us by the defendants, in support of their motion. They are not controverted to any considerable extent by the prosecution. There is an affidavit by the district attorney, and there are several affidavits by others, many of whom have been instrumental in procuring the indictments, expressing a strong impression of those making them, that an unbiassed jury can

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easily be obtained in the county of Kings. There are no facts stated, and from the nature of the case it could not well be expected that any should be stated, to show that no prejudice prevails generally in the city of Brooklyn against the defendants, upon the question involved in this controversy.

Taking into consideration all the circumstances, it seems to me, that the defendants ought not to be tried by a jury, consisting as it must, if taken from the body of the county, principally of citizens of Brooklyn. I have every confidence in the intelligence and devotion to justice of the jurors of that city. But they may, and probably have, imbibed strong prejudices upon a subject of great public interest, and no one is willing to be tried by jurors prejudiced against himself or his interest, however respectable and well informed they may be. That the residents on a long and populous street, extending from the South Ferry to Bedford, are warmly and actively opposed to the defendants in this controversy, and are thus disqualified from acting as jurors, there can be no doubt. A feeling operating through such an extended locality is apt to prevail much further through the influence of business connections, family ties and friendly intercourse. That it has extended itself through a large portion of the city, is apparent from the large public meetings, the action of the common council, composed as it is of representatives of the whole city, and, possibly, the multiplied action of the grand jury. I do not mean to say that in all this the citizens or the common council, or the grand jury have erred, but it does seem to me, with the greatest respect for all of those bodies, that the conduct of the public meetings and the people's representatives indicates a foregone conclusion against the defendants, which renders it proper that the questions to be tried in these cases, should be submitted to jurors to be selected from another community.

The district attorney objects principally on the ground that a trial in another county would subject the witnesses for the prosecution, who he says are numerous, to great inconvenience, and yet he states in his affidavit, that the cases will be decided principally, if not wholly, upon a question of law. If he is

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right in that, there cannot be any urgent necessity for the attendance of many witnesses. We are not informed by the papers before us, nor do I know from any source, what particular questions are involved in the general charge brought against the defendants.

It is so well understood, that I think we may take judicial notice of the fact, that the inhabitants of our cities generally suppose that the use of steam in propelling locomotives through their streets is so far noxious that it is unjustifiable. If that should be the ground of complaint, or if in addition to that, it should be contended that tunnelling a street for railway purposes was illegal, but few witnesses would be necessary. These are the only questions of law, which so far as I understand the cases, will be probably involved on the trial.

The district attorney objects to sending the cases for trial to either of the other counties on the island, on the ground that the popular feeling there is in favor of the use of steam on the railroad in Brooklyn. The evidence to prove the existence of such favorable feeling among the inhabitants of those counties, is inferior to that going to show the prevalence of hostile feelings in the citizens of Brooklyn, but still I am not inclined to change the place of trial to either Suffolk or Queens county. It is better that the cases should be tried where there is clearly no popular bias or prejudice which might interfere with the due administration of justice.

The court-house in the county of Westchester is not distant from Brooklyn, and with the present conveniences of travelling furnished by the railroads, there can be no great inconvenience or heavy expense incurred in taking the witnesses to White Plains. For the reasons which I have assigned, but certainly from no distrust of the intelligence or ordinary impartiality of the jurors of the county of Kings, I am inclined to change the place of trial in the cases under consideration, into the county of Westchester. Liberty should, however, be given to the public prosecutor and the defendants to select any other county by mutual consent.

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COURT OF APPEALS.

The People *ex rel.* WM. GORMAN agt. THE BOARD OF METROPOLITAN POLICE.

The relator was a member of the old police of the city of New-York. When the Metropolitan police came into existence, they entertained charges against the relator for alleged "wilful disobedience of orders and insubordination." The specification of the charge was, "refusing to obey the orders of his superior officer, on the 18th day of June, 1857."

On the 23d of June, a notice requiring the relator to appear before the Board of Police, at a specified time and place, to answer to the charge, was delivered to an officer for service, but instead of being served personally, it was left at a station-house, where it was received by another person, by whom it was retained. Neither the notice nor its contents came to the notice of the relator.

The officer who had been charged with the service of the notice, and who had only left such notice at the station-house with a person who promised to deliver it to the relator, made an affidavit of the service of such notice, and upon this proof the Board of Police proceeded at the time and place specified, to hear and determine the case. On June 26th, it was adjudged that the charge was established, and that the relator be dismissed from the service of the department.

Held, that under the 7th section of the act under which these proceedings were held, and which declares that no person shall be removed from office, "except upon written charges preferred against him to the Board of Police, and after an opportunity shall have been afforded him for being heard in his defence," the Board of Police had no authority to proceed. Their order of dismissal was void for want of jurisdiction. This was equally so whether at the time the proceedings were instituted, the relator was in office or not.

June Term, 1858.

ROOSEVELT, Justice. This case involves necessarily a single question. The 7th section of the new Police Act provides that no person shall be removed from office in the department except upon written charges and "after an opportunity shall have been afforded him of being heard in his defence." And in the 11th section it is declared that "no person who shall ever have been removed from the police force (established by this act) for cause, shall be re-appointed by the Board of Police

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to any office in the said police force." The judgment of removal rendered by the commissioners against Gorman, the relator, was pronounced without notice; or at least without any such notice as the law can recognize in a case involving such serious consequences to the individual charged, as well as to the public. The case states that the notices of the charge made and of the time of trial, "were never delivered or their contents communicated to the men, and that the relator was not aware of the notice." In a legal sense, the relator had no "opportunity of being heard in his defence." The order of removal was, therefore, void for want of jurisdiction. But although a nullity in itself, it involves an apparent deprivation of a legal right. It is consequently a proper subject of review, and being palpably erroneous, should not be allowed to stand.

Without considering the question whether the relator has resigned, abdicated or repudiated the office which was tendered to him, or in which he was continued, by the new law, or any of the other questions which have been argued by the counsel, and reserving those questions for further advisement until the case of McCune shall be disposed of, the order under review shall be quashed on the single ground of want of due notice.

Judgment of the supreme court accordingly affirmed.

HARRIS, Justice. At the time the act to establish a Metropolitan police district went into operation as a law, the relator was a policeman in the city of New-York. The legislature intended that he should be transferred from the police force as it then existed, to the new police force for which the act provided. It needed no new appointment, nor any formal act of acceptance, to constitute him a patrolman of the Metropolitan police.

But it *did* require his consent. He could neither be made a patrolman, nor having become such, be made to continue in office against his will. Whether he in fact rejected the office or by his subsequent acts or conduct abandoned it, and thus ceased to be a member of the new police force, is a question upon which different views are entertained, and which for the

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purposes of this case, it is not deemed necessary to determine.

Whether he was in office or not, the Board of Police entertained charges against him, and assumed to try him. An order was made that he be dismissed from office. These proceedings, we all agree, were illegal. A charge had been preferred against the relator. The offence alleged was "wilful disobedience of orders and insubordination." The specification of the charge was "refusing to obey the orders of his superior officer on the 18th day of June." On the 28d of June, a notice requiring the relator to appear before the Board of Police, at a specified time and place, to answer to the charge, was delivered to an officer for service, but instead of being served personally, it was left at a station-house, where it was received by another person, by whom it was retained. Neither the notice nor its contents came to the knowledge of the relator.

The officer who had been charged with the service of the notice, and who had only left such notice at the station-house with a person who promised to deliver it to the relator, made an affidavit of the service of such notice, and upon this proof the Board of Police proceeded, at the time and place specified, to hear and determine the case. On June 28th, it was adjudged that the charge was established, and that the relator be dismissed and removed from the service of the department.

By the 7th section of the act under which these proceedings were held, it is declared that no person shall be removed from office, "*except upon written charges preferred against him to the Board of Police, and after an opportunity shall have been afforded him of being heard in his defence.*" The return made by the defendants themselves, shows that the relator had no opportunity of being heard. No notice was served upon him, and he was entirely ignorant that proceedings had been instituted against him, until after sentence of dismissal had been pronounced. Under these circumstances, the Board of Police had no authority to proceed. Their order of dismissal was void for want of jurisdiction. This was equally so, whether at the time

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the proceedings were instituted, the relator was in office or not.

It is true, that if the relator was not actually in office at the time the charges were preferred against him, the Board of Police would have had no authority to try him, even if he had been served with notice to appear before them. The proceedings would have been absolutely void. And yet they should not be allowed to stand upon record against the relator. Were the only effect of a sentence of dismissal to remove the party from office, he would have no right to complain of such sentence, if at the time it was pronounced, he was already out of office. But it is declared by the 12th section of the act organizing the Board of Police, that no person who shall ever have been removed from the police force for cause, shall be re-appointed by the Board of Police to any office. The effect of the sentence, so long as it stands unreversed, is to furnish *prima facie* evidence that the relator is disqualified from holding office in the Metropolitan police force. Conceding, therefore, that the relator was not in office, he still had a right to have the proceedings against him reversed, on the ground that their effect, if allowed to stand, might be to render him ineligible to office in future.

It is insisted on the part of the defendants, that the decision of which the relator complains cannot be reviewed upon *certiorari*. If, as the counsel for the defendants suppose, the order or sentence dismissing the relator from office was an exercise of administrative or executive power, the objection would, undoubtedly, be well grounded. But the proceedings in question are to be regarded as *judicial* in their character. It is the office of *certiorari* to confine inferior officers or tribunals exercising judicial powers, within the boundaries of their jurisdiction. The order in question being a judicial proceeding, it is a proper subject of review upon *certiorari*. As we have already seen, the relator was entitled to be heard before the defendants were authorized to make the order against him. Not having had this opportunity, the proceedings were illegal. Upon this ground alone, and without reference to the question,

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whether at the time the proceedings were instituted against him, the relator was in office or not, the judgment of the supreme court should be affirmed.

All the judges concurring ; judgment affirmed.

SUPREME COURT.

HAYWOOD agt. SHAW and others.

The omission to record an instrument does not prejudice the right of the grantee, as against a subsequent grantee, *with notice*.

It was *held* in this case, that the plaintiff through his agent, had notice from the facts and circumstances, of a prior mortgage to his own, although it was unrecorded ; and that such prior mortgage was decreed to be prior in lien upon the premises, to the plaintiff's mortgage.

New-York Special Term, April, 1858.

APPLICATION for judgment on mortgage foreclosure.

_____ *for plaintiff.*

_____ *for defendants.*

CLERKE, Justice. The omission to record an instrument, does not prejudice the right of the grantee as against a subsequent grantee, with notice. The only question here is, had the plaintiff notice? The plaintiff and his agent well knew that Shaw was not the owner of the property, at the time of the negotiation relative to the loan ; but that he was about to purchase it from the defendant Morrill. His agent knew that the house was worth \$10,000, and that that was the price for which it was to be sold. He knew that Shaw had no cash to pay for it, but the \$1,000 which he was to procure from the plaintiff, and that there was a prior mortgage for \$5,000. Could they have supposed, that, contrary to all usage, the ven-

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dor would have taken an unsecured promise for the remainder? When we add to this, the much stronger circumstance, that all parties were present at the time of the delivery of the deed by the vendor to Shaw, the delivery of the mortgage for a part of the consideration by Shaw, the drawing of the notes, and the payment of the \$1,000 lent by the plaintiff to Shaw, the only amount in cash paid on the transaction, and the delivery of the mortgage to the plaintiff's agent, to secure the plaintiff's loan, it is difficult to imagine that the plaintiff through his agent, had not notice of the vendor's mortgage.

I therefore adjudge the priority of Miss Morrill's mortgage, and let it be referred to John Harnett, Esq., 39 William-street, to ascertain the amount due on each mortgage, and when this is ascertained, let judgment be entered accordingly, payment to be made out of the proceeds of the sale, according to the priority here adjudged, without costs to the plaintiff, and if the proceeds are not sufficient to pay Miss Morrill's costs, the plaintiff must pay them.

SUPREME COURT.

CHARLES CRUYT, Respondent agt. JOHN PHILLIPS, Appellant.

In pleading an attachment, it is not necessary to show its regularity in order to show jurisdiction in the officer issuing it, and jurisdiction is all that need be pleaded.

In an action on an undertaking on attachment in a court of general jurisdiction, it is unnecessary even to allege jurisdiction. It is enough to allege the pendency of such a suit; the jurisdiction of the officer to issue the attachment not depending upon the truth or sufficiency of the facts upon which the attachment was granted, but upon the jurisdiction of the court in which the suit was brought, and the order made.

Kings General Term, February, 1858.

APPEAL from judgment of city court of Brooklyn, overruling demurrer of defendant to complaint of plaintiff.

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This action was originally commenced in the city court of Brooklyn, by Charles Cruyt, plaintiff, against William F. Schmidt and John Phillips, defendants. The complaint was as follows: The complaint in this action respectfully shows, that on or about the 18th day of September, 1854, an attachment issued out of the supreme court, in an action commenced by Charles Cruyt, the plaintiff herein, against Paul M. Biebuyck, to recover, First, the proceeds of the sale of certain goods, laces and embroideries of the plaintiff, and damages for the conversion of said Biebuyck to his own use of certain other goods, laces and embroideries of said plaintiff; second, for money lent by said plaintiff to said Biebuyck on his own request; and third, for money due by said Biebuyck to said plaintiff; that afterwards, and on or about the first of November, 1854, the said Biebuyck having appeared in said action, and being about to apply for a discharge of said attachment, the defendants herein, William F. Schmidt and John Phillips, undertook in the sum of \$1,700, that they would, on demand, pay to the plaintiff, said Cruyt, the amount of the judgment which might be recovered against said Biebuyck in that action, not exceeding said last-mentioned amount; that said attachment was thereupon discharged, and that subsequently, and on the 5th of July, 1855, said plaintiff recovered a judgment against said Biebuyck, in said action, for \$416.40 damages and costs, as appears by the record and docket thereof, duly entered and docketed, July 5th, 1855, in the county clerk's office of Kings county; that the said Biebuyck has not paid the amount of said judgment, or any part thereof; that a demand of payment thereof to said plaintiff was duly made of said defendants, on or about the 15th day of March, 1856, which they and each of them refused; and that they have never paid the same, or any part thereof, to said plaintiff, although often requested and demanded so to do, but are justly indebted to the plaintiff, by reason of the premises, in the sum of \$416.40, with interest thereon from July 5th, 1855.

Wherefore, &c., the defendants demurred to the complaint, for want of sufficient facts to constitute a cause of action. The

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demurrer being overruled and judgment entered thereupon, the defendant Phillips, appealed therefrom to the general term of this court.

J. D. DUNN, *for appellant*, made and argued the following points:

First. Prior to the Code, it was necessary in pleading the proceedings of inferior courts or officers of special jurisdiction, to state the facts conferring jurisdiction. (*Cleveland agt. Rogers*, 6 *Wend.* 438; *Cornell agt. Barnes*, 7 *Hill*, 36, and * *note*; *The People agt. Koeber*, 7 *Hill*, 39; *Barnes agt. Harris*, 3 *Barbour*, 603.)

Second. The Code contains no provision dispensing with this necessity, except that which is embraced in section 161, which is as follows: "In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been *duly* given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction."

Third. The officer issuing a warrant of attachment, is an officer of special and limited jurisdiction.

1st. The power to issue an attachment is derived from special statute. (*Code*, § 228.)

2d. The act of issuing an attachment is not the act of the court as such, but the act of the judge from whom the warrant is obtained, who may be either a judge of the court in which the action is brought, or a county judge. (*Code*, § 228.)

3d. The act of issuing an attachment is an act done out of court, and a justice of the supreme court, like any other officer when acting out of court, is an officer of limited jurisdiction. (13 *Howard's Rep.* p. 374.)

Fourth. The complaint in this action is bad, inasmuch as it neither sets up the facts necessary to confer jurisdiction upon the officer who issued the attachment, nor does it state that an attachment was duly issued.

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HOWARD C. CADY, *for respondent*, made and argued the following points:

First. The complaint sets forth that an attachment issued out of the supreme court, in an action commenced to recover, among other things, for the conversion of goods of the plaintiff; that defendants appeared and undertook on discharge of such attachment, to pay judgment, if recovered, on demand; that the attachment was thereupon discharged; that judgment was subsequently duly entered, &c., thereupon a demand made, and that judgment remains unpaid; the record and docket are also set up.

This is sufficient. (*Slack agt. Heath*, 1 *Abbott's Pr. R.* 334; *Ward agt. Begg*, 18 *Barb. S. C. R.* 142; *Loomis agt. Brown*, 16 *Barb. S. C. R.* 380.)

Per GRIDLEY.—“The complaint sets forth the nature of the suit so far as to show that an injunction was granted in it by a justice of this court, * * it was * * commenced * * issues joined * * and a judgment rendered therein. This is a sufficient statement.”

Second. As to jurisdiction, the “attachment issued out of the supreme court,” and that court has general jurisdiction; and as to whether facts showed a case for an attachment, it has been decided that “an attachment under the Code is an order issued as a judicial determination, from the facts, that the case is one in which an attachment should be granted.” Therefore, it is not necessary to set up those facts; their sufficiency must be presumed. (*Genin agt. Thompson*, 12 *Barb. S. C. R.* 287.)

Third. The parties to the undertaking are precluded thereby as to these questions of jurisdiction or fact. They have made their undertaking and limited the same to three points:

1st. As to whether judgment has been recovered, and it is alleged that the same was duly entered, and the judgment and its docket are set up.

2d. Whether it is unpaid, and that is alleged; and,

3d. Whether there has been a demand, and that is alleged. (*Loomis agt. Brown*, *id*; *Haggart agt. Morgan*, 1 *Seld.* 428; *The People agt. Falconer*, 2 *Sandf. R.* 81, and cases cited.)

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Per SANDFORD.—“The execution of the (administrator’s) bond precludes both principals and sureties from gainsaying the surrogate’s jurisdiction, in any proceedings for the assets which the appointment and bond have enabled the principal to receive.”

Fourth. The 161st section of the Code is not applicable here. This judgment was not that of a court or officer of *special* jurisdiction.

The words “duly or in pursuance of statute,” may be used where provided for by statute, but they add nothing elsewhere in pleading. They were not facts. (*Shaw agt. Tobias*, 2 *Chm.* 188)

By the court—EMOTT, Justice. An attachment in an action in this court, is not process by which a suit is commenced, but merely a provisional remedy. In this respect it is like an injunction. It has, therefore, been held that the statements in the affidavits on which an attachment is issued, are not jurisdictional facts; that the attachment is not void if the statements are insufficient, and that any defects in the affidavits may be supplied on a motion to set aside the attachment. The jurisdiction is conferred by the commencement of the suit, all afterwards is a question of regularity or of the discreet exercise of power. In pleading an attachment, therefore, it is not necessary to show its regularity in order to show jurisdiction in the officer issuing it, and jurisdiction is all that need be pleaded.

Again; the attachment is an order of a judge acting as an officer of a court of general jurisdiction, and made under the jurisdiction of the court acquired by the commencement of a suit. Nothing but the commencement of the suit was needed to confer the jurisdiction, and as the suit in this case was in a court of general jurisdiction, it is unnecessary even to allege this.

At all events, it is clear, that as the jurisdiction of the officer to issue the attachment did not depend upon the truth or sufficiency of the facts upon which the attachment was granted, but upon the jurisdiction of the court in which the suit was

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brought and the order made, it is enough to allege the pendency of such a suit. If it were otherwise, as the question of jurisdiction is certainly an issuable question, no allegation is necessary in a pleading which is not material and traversable. (*Ensign agt. Sherman*, 14 *How.* 439.) Upon a traverse by the defendant of such an allegation as his demurrer calls for, the sufficiency and the truth of all the statements on which the attachment was allowed, could be inquired into in this collateral action. That is, in an action on an attachment bond, the jurisdiction of the officer who granted the attachment must be stated and shown by pleading and proving the correctness of his decision in granting it. Such a rule of law or pleading would be intolerable.

The judgment of the city court is correct and should be affirmed.

NEW-YORK COMMON PLEAS.

PHILOLOGOS HOLLEY agt. HENRY D. TOWNSEND.

A man is not entitled to a *commission* from the owner, for informing a broker that certain lots are in the market, a purchaser for which is afterwards procured by the broker through such information.

And this is so, where the man had previously had a limited contract for a commission for the sale of the lots, and at its expiration informed the owner that he could do nothing with them.

A right to a commission must be founded upon contract expressed or implied.

General Term, 1858.

Before HILTON, DALY and BRADY, *Judges*.

THIS action was commenced by Philologos Holley to recover of Henry D. Townsend, a commission of one per cent., amounting to \$150, for selling six lots on forty-seventh street. These lots are a portion of a row extending along the north side of forty-seventh street, from Broadway to Sixth avenue, pur-

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chased by Mr. Bulkley, and on which he has since erected a row of large brown stone dwellings.

In September, 1856, immediately on his return from Europe, Mr. Townsend was called on by Byron M. Holley, a son of the plaintiff, who proposed to find him a purchaser for the lots, Mr. Townsend agreeing to pay him a commission if he did, and gave him by letter, until a certain Friday, to report whether he could do anything. Byron M. Holley called on the day fixed, and said he could do nothing with the lots.

In the following winter, another broker, John O'Higgins, called upon Mr. Townsend and negotiated for the lots. Mr. Townsend asked him if he intended to charge a commission. He replied that he did, upon which Mr. Townsend declined to sell the lots. O'Higgins called the next day and agreed to charge no commission, whereupon the sale to Mr. Bulkley was completed, and the contract signed.

This was in February, 1857. Mr. O'Higgins admitted on the trial, that he was acting in behalf of Mr. Bulkley, the purchaser, who had agreed to pay him a commission. He also testified that he had been informed about the lots by the plaintiff before he went to Mr. Townsend, and that he told Mr. Townsend that he came from Mr. Bulkley. This Mr. Townsend denied.

The plaintiff claimed to recover on the ground that the plaintiff was originally employed to sell the lots, and that O'Higgins, who actually effected the sale, obtained his information from him; that the sale was therefore effected by his agency.

The defendant insisted that the employment of the plaintiff terminated when, on a day fixed, he reported he could do nothing with the lots; that there was no evidence that the plaintiff was the procuring cause of the sale; that if O'Higgins acted in any capacity for the plaintiff, the plaintiff was bound by his agreement to charge no commission.

On the trial judgment was given for the plaintiff, and the case was taken by appeal to the general term, where the judgment was reversed.

Holley agt. Townsend.

L. J. GOODALE, *for plaintiff.*WM. R. MARTIN, *for defendant.*

HILTON, Judge. In the fall of 1856, the defendant owned six lots on forty-seventh street in this city; the plaintiff's son, Byron M. Holley, called to inquire their price, and to learn what commissions the defendant would give upon a sale.

The testimony is conflicting as to whether or not Byron M. Holley stated to the defendant that he came on behalf of the plaintiff, and it is quite evident from the letter of the defendant to Byron M. Holley, in evidence, that he, and not the plaintiff, was the person with whom the defendant supposed he was dealing. This negotiation was finally ended by Byron M. Holley calling upon and informing defendant of the inability of Holley, or the party for whom he had acted, to purchase the lots. The defendant was then justified in supposing that, as the negotiations entered upon by Holley had ceased, all obligations connected with, or incident to it, were at an end.

Some time after, a Mr. O'Higgins called on the defendant respecting these lots, having been informed of his ownership by Holley, (whether plaintiff or his son is not specified.) O'Higgins says that he distinctly told defendant when he called, that he came from Holley, and the defendant states directly the contrary. But whether O'Higgins so stated or not, is quite immaterial, because he and the defendant agree as to what subsequently took place respecting the sale and commissions.

Upon O'Higgins opening the conversation with the defendant respecting these lots, the defendant inquired whether commissions were to be charged him; being answered in the affirmative, he at once declined to sell on the terms proposed. O'Higgins then left, and as it appears from the testimony of the witness Day, having in the meantime secured his commissions from the purchaser, called the day after on the defendant, and agreed to take the lots and charge no commission. This agreement was distinctly reiterated at the time defendant executed and delivered to O'Higgins the final contract

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of sale, and in the presence of the subscribing witness Long. Under the circumstances, it seems difficult to understand upon what principle the defendant can be held liable to the plaintiff for commissions on this sale.

Long before its negotiation commenced, any contract which existed between the plaintiff and defendant respecting these lots, was put an end to by the mutual understanding of the parties to it, and throughout the interviews which terminated in the sale finally made, it was distinctly and expressly agreed between the defendant and O'Higgins, that no commission was to be expected or paid.

The judgment must, therefore, be reversed.

DALY, First Judge—Concurred, and gave the following opinion: I agree with Judge HILTON. Byron M. Holley testified that Townsend told him that the lots were for sale, and that he would pay a commission of one per cent. Townsend testified that he gave Byron M. Holley until Friday to see what he could do, upon which day he called and said he could do nothing with the lots. Before this point there is no conflict, and it is, I think, decisive of the case. Even if Byron M. Holley told Townsend that he came from the plaintiff, this must be construed as a contract to pay a commission, provided a purchaser was procured by the day fixed. On that day Byron M. Holley called, and told Townsend he could do nothing, and the employment was at an end. A sale was afterwards effected through O'Higgins, who obtained his commissions from the purchaser, Townsend having refused to pay him a commission. The plaintiff did not procure the purchaser; he merely informed another broker that the defendant had the lots for sale, and that broker procured the purchaser and sought to get the defendant to pay him a commission for effecting the sale, which the defendant declined. There was no employment existing when plaintiff informed O'Higgins that the lots were for sale, and a man is not entitled to a commission from the owner for informing a broker that certain lots are in the market, a purchaser for which is afterwards procured by the broker. A

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right to a commission must be founded upon a contract expressed or implied, and none existed between the defendant and the plaintiff when O'Higgins procured the purchaser.

The judgment should be reversed.

Judge BRADY delivered a dissenting opinion.

Judgment reversed.

SUPREME COURT.

MOSES M. JONES agt. THE UNITED STATES SLATE COMPANY.

On a motion to set aside a judgment taken by default for irregularity, because the complaint was not sworn to, and because there was no legal evidence of the service of the summons, which was made upon the managing agent of the defendants, there being no affidavit annexed verifying the signature of the agent, who gave an admission of service;

Held, that these were irregularities which should have been taken advantage of promptly, and at the first opportunity. The delay in moving was fatal to the motion in this respect. Under the facts and circumstances presented, the plaintiff was allowed to amend *nunc pro tunc*, by filing his affidavit of verification of the complaint; and was also allowed to annex an affidavit verifying the signature of the agent of the defendants.

One of the defendants, a non-resident, who had been proceeded against by attachment, (after the issuing and return of execution unsatisfied upon the judgment by default,) moved to be let in to defend on the merits. The case was a peculiar one in the respect that one member of the company (defendants) swore against another. One, the non-resident defendant, affirming, and one, the managing agent, denying that there was a defence. Under these circumstances, something more than the usual affidavit of merits was required to authorize the court to let in the defendant to defend. Such terms and conditions were, therefore, imposed that the plaintiff's rights under his attachment might not be put in jeopardy, by requiring security in an undertaking, that the defendant pay any amount which the plaintiff should finally succeed in establishing on the trial, &c.

Washington Special Term, June, 1857.

MOTION to set aside judgment.

The plaintiff obtained a judgment against defendants in the
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above action, on the 22d of October, 1856, for \$1,668.25, damages and costs, and filed roll in Washington county.

The complaint was not sworn to, but the plaintiff took his judgment without any formal proof before the clerk. He swears that it was intended to swear to the complaint; but that he was absent from the county when the judgment was taken, and was unable to verify his complaint; but that the whole amount of the judgment was for a just demand; that no offsets justly exist against it, and proposes to amend the complaint by annexing thereto his affidavit of verification; that the company is insolvent and wholly unable to pay its debts, and that execution on the judgment has been returned by the sheriff of Washington county wholly unsatisfied; that since the return of the execution he has commenced an action against Seth H. Butler, who was a stockholder in said company, to an amount far exceeding the amount of the judgment, at the time the debt was contracted, and was secretary of the company; that Butler as well as Robert M. Jones, the general agent of the company, on whom the summons in this action was served, repeatedly admitted that the debt was a just one, but that the company was insolvent, and would beat plaintiff on the execution; that the action against Butler was commenced by attachment, he being then and still a non-resident of this state, residing in Philadelphia; that the sheriff attached some real estate of Butler's in the county of Washington, which is the only property real or personal of the said Butler, or either of the stockholders of the company, from which any part of the judgment can be collected; that soon after the service of the attachment, Butler conveyed the said real estate so attached to his brother Cyrus Butler, without consideration as he believes, and that if the judgment is set aside, and his lien under the attachment destroyed, he will probably lose the whole amount of his debt, as the land attached is inadequate security for the debt; that the attachment was served on Butler's agent in Granville, on the 1st day of December, 1856, and a copy left with the agent, which was immediately sent to Butler at Philadelphia; that a copy of the complaint duly verified against

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Butler, setting forth the judgment in this action, was served on his attorney on the 28th of February, 1857, and an answer served on plaintiff's attorney on the 20th of March, 1857; that Butler and his attorney were informed of the entry of judgment on the 13th of January, 1857; that the cause against Butler being at issue, was noticed for trial at the Washington circuit on the 4th Tuesday of May, 1857, and that no steps were taken to set aside the judgment in this action, until after the service of notice of trial, when notice of this motion was served for the same circuit.

Mr. Butler swears, that the first knowledge he had of the recovery of the judgment was by letter from his attorney in the fore part of March last, and that the company does not owe plaintiff, but that plaintiff owes the company a balance; and that the agent on whom the summons was served, is the brother of plaintiff, and that there was a connivance between him and the plaintiff secretly and fraudulently to obtain and suffer a judgment against the company, when nothing was due the plaintiff. In most of these facts he is contradicted by both plaintiff and his brother, and in others by different affidavits, in some of which it is deposed that he (Butler) knew of the commencement of the action against the company, and admitted its indebtedness, and that they had no defence to the action and did not intend to make any, but that the company had no means of paying. Robert M. Jones, the agent, swears that he was the only acting agent and managing officer of the company; that the debt was frequently talked of between him and Butler, and its justice admitted; that he informed Butler, shortly after the commencement of the action, of it, and that Butler replied that the company had no defence but had nothing to pay, and would beat plaintiff on the execution; that the summons was served on him personally, and the reason he did not defend was, that the company had no defence to make to the action. Mr. Buckley swears he paid plaintiff at one time \$200 on this debt, at the request of Butler, which was credited, and not included in the judgment.

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The admission of service of summons was signed "R. M. Jones, general agent of The United States Slate Company," but was not verified by affidavit. A motion is also made to set aside the attachment against Butler, on the ground that no undertaking has been filed. It has since been filed.

B. F. AGAN, *for plaintiff.*

O. F. THOMPSON, *for defendant.*

C. L. ALLEN, Justice. The weight of evidence as derived from the affidavits on both sides, is, that the secretary of the company, Mr. Butler, knew of the action against the company, and of the judgment previous to the fore part of March last, when he admits he knew of it, but swears that he had no previous knowledge. The affiant deposes that he was informed of the commencement of the suit shortly thereafter, and that he replied there was no defence, but that the company would beat plaintiff on the execution. He was bound to move promptly as soon as he discovered the irregularity. If the affidavits on the part of the plaintiff are to be believed, he has slept upon his rights since the recovery of the judgment in October last. And even if his own affidavit is to be taken as the only true one, he *has omitted* to take any steps to rid himself of the irregularity since the fore part of March last, and did not move until after the action against him on the attachment was noticed for trial at the present circuit. Within the cases he has been guilty of laches, so as to deprive him, I think, of relief on his motion, for irregularity. (9 *How.* 75; 1 *Den.* 666; 18 *Wend.* 114, &c.; 11 *How.* 91.) It was undoubtedly irregular in the plaintiff to take judgment as he did, when his complaint was not sworn to, but I think he may amend his complaint and verify it now, as he proposes to do; and under the circumstances, as he swears that the debt is an honest one, (and in that he is supported by other affidavits,) and as he further swears, that he will be in danger of losing his debt if the judgment is set aside, and that the company is utterly insolvent, I am inclined to permit him to amend by filing his affi-

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dayit of verification of his complaint *nunc pro tunc*. (9 How. 31; Code 1852, § 176.)

It is objected that there was no legal evidence of the service of the summons, and that there should have been an affidavit annexed, verifying the signature of the agent. (5 How. Pr. R. §41; 1 Code Rep. N. S. 42; 1 Whit. 139, 140.) But it turns out by the affidavit of Jones, that he was the managing agent of the company, and did actually sign the admission of service as such agent. Besides, this is an irregularity which should also have been taken advantage of at the earliest moment, and the plaintiff may also be at liberty to amend, if he is advised it is necessary, and annex an affidavit verifying the signature of the agent. The affidavit is already made, and forms part of the opposing papers on this motion.

The question then arises on the merits. The affiant Butler, makes a general affidavit of merits, and claims that the facts *constituting* it, are detailed in the affidavit. No facts are detailed, except that plaintiff is indebted to the company in the sum of about \$366, and which the affiant swears, he hopes to be able to prove. He swears, it is true, that the judgment was obtained secretly, and by collusion with the agent Jones, who is the brother of plaintiff, and with a view, as he believes, of defrauding and injuring him. But in this he is contradicted by three affidavits, all swearing that the debt was not obtained by collusion, but was honestly due, and that he (Butler) admitted to them all, that the debt was due, but that plaintiff must wait until the company had means to pay. His general affidavit of merits can hardly avail to set aside the judgment and execution, after the lapse of time since the knowledge of the commencement of the action, so as to prejudice the rights of the plaintiff. (Patterson agt. Graves, 11 How. 91.)

The case is a peculiar one. Butler swears that he is the secretary and treasurer of the company, and that the defence has merits. R. M. Jones, on the other hand, deposes that he is a member of the company, being a large stockholder, and the general and managing agent of the company, and that the reason that he did not defend was, that he well knew the debt

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was a just one, and that the company had no defence. He further swears, that he informed Butler that the suit was commenced against the company, and that Butler agreed with him that there was no defence, but that the company had no means of paying, and that plaintiff must wait until they had means of paying, and that they could beat him on execution. This is not, therefore, the ordinary case of a defendant's asking to be let in to defend on an affidavit of merits. It is one member of a company swearing against another, one affirming and one denying that there is a defence.

Under these circumstances, and the additional facts which appear, that Butler is a non-resident, and has no other property in the state, save that which has been attached; that he has been sued as a member of the company, and that the action can only be maintained on the averment under the section of the act which requires that a judgment shall have been obtained against the company, and an execution returned unsatisfied; that he has, since the service of the attachment, conveyed the land attached to his brother, and that the company are wholly insolvent, it would not, in my judgment, be the exercise of a proper discretion to permit him to come in and hazard all the rights of the plaintiff, which he has by his diligence obtained. I am aware of the rule which has obtained, that the merits ought not to be tried by *affidavit*, and I would be inclined to permit Mr. Butler to come in and defend the action, if by permitting the judgment and execution to stand as security, the plaintiff's rights under his attachment against Butler, might not thus be put in jeopardy, especially as he has conveyed to his brother. As I am not certain on this point, and as he can have no objection to providing security for the payment of any recovery that may be had on the trial, if he has any confidence in the defence which he swears to, I will permit him to come in and interpose a defence, on his making and filing a bond or undertaking, with sufficient surety, who shall justify and the undertaking be acknowledged and filed with the clerk of this court, that he will pay any amount which the plaintiff shall finally succeed in establishing on a trial of said

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action, with interest and costs, within thirty days after service of a copy of this order on his attorney, and if he shall do so, all proceedings against him in the action on the attachment, are to be stayed, until after the trial of the action; and the motion to set aside the attachment is to be denied. The plaintiff having had granted him a favor on this motion, no costs are to be allowed to either party.

Order accordingly.

SUPREME COURT.

JOHN KELLY agt. MILFORD BARNETT and others.

Vagueness in pleading, it is well settled, is not *frivolousness*, it is to be corrected by *amendment*, and not visited by *judgment*.

On an application for judgment on the ground that the answer is sham or frivolous, it is enough that a good defence is "shadowed forth." If it can be seen that the defence set up, if true, is good, it is sufficient to prevent a summary judgment. It is only necessary that the defence should not be clearly bad.

In this case, the defendants set up a want of consideration in the note given on the purchase of wines, so called; alleging that the wines purchased, called "Port," "Pale Sherry," "Burgundy," "Muscat," and "Madeira," turned out to be mere sham fabrications.

Held, that it was due to the public health that a full trial should be had. If it was true, (as alleged in the answer,) that manufactories existed in the city of New-York, for the getting up of "unwholesome and spurious mixtures," to be palmed off upon the unsuspecting as wines of "the pure juice of the grape," under the captivating names above mentioned, the courts, instead of suppressing, should assist in their investigation and exposure.

New-York Special Term, November, 1857.

MOTION for judgment on account of frivolousness of the answer

_____ for plaintiff.

_____ for defendants.

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ROOSEVELT, Justice. The defendants object to paying the note on which this suit is brought, on the ground that it was given on the purchase of certain alleged wines called "Port," "Pale Sherry," "Burgundy," "Muscat," and "Madeira," which turned out to be mere sham fabrications. Considering this answer as a mere sham defence, the plaintiffs on that ground, or rather as they express it, on the ground of its "frivolousness," apply for a summary judgment without further trial.

The question then presents itself—and it is the only one now to be determined—is such a defence, admitting it to be true, to be treated as a trifling with judicial proceedings?

Wines, say the defendants, of the denominations mentioned, are the product of grapes of peculiar character and excellence, grown and manufactured in different parts of Europe, "and owe all their value to their purity, to the skill exercised in their production and fermentation, and to the characteristic excellences impressed on each by the peculiarities of the climate and soil of the countries where they are produced;" whereas, the fluids set forth in the bills rendered by the plaintiff Kelly, and described by the technical names of Port, Sherry, Madeira, Muscat and Burgundy, "were not wines at all, but mere mixtures of the most noxious and deleterious character, concocted in the city of New-York, by the plaintiff, with intent to deceive and defraud," and that "said mixtures contained no particle whatever of the juice of the grape in their composition, and were poisonous and of no value." The defendants, therefore, insist not only that the note was without consideration, but that they have a counter claim of \$3,000 against the plaintiff for the damages sustained by them from his "worthless and unmerchantable mixtures, and in consequence of his wilful misrepresentations and fraudulent acts."

Admitting this answer to be true—as the plaintiff on the present application must—can any one say, "that its insufficiency as a defence is so glaring that the court can determine it upon a bare inspection without argument?" (6 *How. Pr. Rep.* 358.)

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The Code allows such motions to be made on a notice of only five days, and "to a judge either in or out of court." It indicates, therefore, in the strongest manner, the cases to which they should be confined. A mode of giving judgment, so stringent and summary, was never intended for a case like the present. The answer may perhaps be defective in precision, it omits to aver with absolute directness that the defendants purchased the "fluids" in question, in the belief that they were the "genuine article," or that they paid for them the "genuine price." But vagueness in pleading, it is well settled, is not frivolousness; it is to be corrected by amendment, and not visited by judgment. It is enough on this application that a good defence is "shadowed forth." The one set up by Messrs. Barnett & Co., if true, is good; it is only necessary that it should not be clearly bad. It is due also to the public health that a full trial should be had. If it be true that manufactories exist in this city for the getting up of "unwholesome and spurious mixtures," to be palmed off upon the unsuspecting as "the pure juice of the grape," under the captivating names of Burgundy, Madeira, Sherry, Port and Muscat, the courts instead of suppressing, should assist in their investigation and exposure.

Motion denied, with costs.

SUPREME COURT.

CORNELIUS V. S. ROOSEVELT agt. SIMON DRAPER and others.

Where the city of New-York sell real estate, and an action is brought by a plaintiff as a tax payer, and also as a creditor of the city, by reason of his owning \$100, or over, of city stock, not due, to set aside the conveyance as void or improvident,

Held, that the action cannot be sustained. Why? Because, his interest as a tax payer of the city, is too uncertain to entitle him to the interposition of the court,

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as between the city and the vendee of its property; it is speculative and imaginary, and clearly no greater or more certain than that of every other tax payer within the corporation. The law confers no authority upon the plaintiff to prosecute the action for any other person than himself.

And he cannot sustain the action as a *creditor* of the city, for the reason that the stock he holds is not due; and the city has made no default in payment of interest thereon, and he has no lien upon the land in question.

New-York Special Term, June, 1858.

APPEAL from an order overruling a demurrer to complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The conveyance in the complaint was for the sale of the Fort Gansevoort property in New-York city

S. WEIR ROOSEVELT, *for plaintiff.*

WM. M. EVARTS, *for defendants.*

By the court—BALCOM, Justice. If it be conceded that the deed from the mayor of the city of New-York to the defendant Varnum, is voidable or void, still the plaintiff cannot sustain this action. He cannot as a creditor of the city, for the reason that the stock he holds is not due, and the city has not made default in the payment of any interest thereon; and he has no lien upon the land in question.

The law confers no authority upon the plaintiff to prosecute this action for any other person than himself, and his interest as a tax payer of the city is too uncertain to entitle him to the interposition of the court, as between the city and a vendee of its property; indeed, his interest in the matter in dispute, is speculative or imaginary, and clearly no greater or more certain than that of every other owner of city stock and tax payer within the corporation.

The gist of the case made by the complaint, is that the city has made a void or improvident sale of a portion of its real estate, to Varnum, and that the plaintiff believes he will sustain a pecuniary loss by reason thereof, either as a holder of city stock on which nothing is yet due, or as a tax payer of the corporation. If the plaintiff can maintain this action, every

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other tax payer of the city who owns city stock amounting to \$100, may institute a like one. It seems to me, the sanctioning of such a proposition would produce incalculable mischief, and violate the well established principle that one person cannot maintain a civil action for an injury of a public nature, when the injury he sustains is no greater than that sustained by every other member of the community.

The earlier decisions in this district, which seem to hold the doctrine that tax payers may maintain actions similar to the one at bar, have been too much shaken by recent adjudications in this city and the court of appeals, to be relied upon as establishing the right of the plaintiff to the relief demanded in his complaint.

The tax payers of the city, and holders of city stock, must find a remedy, if one is to be found, through the ballot box, the grand jury or the attorney-general, for abuses of corporate authority, by their mayor and common council, in the disposition of city property, or they must apply to the legislature for the passage of different laws than are now to be found in the statutes of the state. I am of the opinion, the complaint in the action does not state facts sufficient to constitute a cause of action, and that the order made at the special term, overruling the demurrer to the complaint, interposed by the defendants Draper and Coleman, should be reversed, and that those defendants should have judgment upon the demurrer with costs, but with leave to the plaintiff to amend his complaint in twenty days, on payment of costs.

Korff agt. Green and others.

SUPREME COURT.

HERMAN KORFF agt. ANDREW H. GREEN, ALBERT GILBERT, The Commissioners of Common Schools, The Trustees of the Common Schools of the Fourth Ward, JOHN MOORE, JAMES FARLEY and HENRY MCKILLOPP, and the Mayor, &c.

New-York Special Term, June, 1858.

PLAINTIFF in this case is a resident freeholder and a tax payer in this city, and brings this suit in his own behalf and in behalf of other tax payers. He shows in his complaint, that on the 15th of March, 1857, the trustees of the common schools in the fourth ward, agreed with the defendants Moore, Farley and McKillopp, to purchase certain premises belonging to the latter, at Nos. 71, 73 and 75 Oliver street, for the purposes of a public school, at the price of \$31,000; that the premises are not worth more than \$20,000, and could at any time prior to the agreement have been purchased at that sum; that Moore, Farley and McKillopp, fraudulently procured the agreement to be made by means of paying, or agreeing to pay, to the trustees of the schools of that ward, or one or some of them, and to the Board of Education, or some or one of them, certain sums of money, amounting to \$2,200, and that the latter procured the contract to be made, knowing the price to be excessive and far above the actual value of the premises. Plaintiff asked an injunction to restrain the sale and the payment of any money thereon.

The defendant Moore, in answer says, he is owner of the premises No. 75 Oliver street, and has sold it to the corporation for \$10,000; that he was not acting in concert or individually with the defendants McKillopp and Farley, for the purpose of fraudulently procuring the purchase of the premises. He denies the charge of bribing members of the Board of Education or of the ward trustees.

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The answer of the mayor, &c., denied any information as to the alleged fraud, and submitted their rights to the court.

P. Y. CUTLER, *for plaintiff.*

A. R. LAWRENCE, JR., *for mayor, &c.*

BEEBE, DEAN & DONOHUE, *for the other defendants.*

Justice INGRAHAM, dismissed the complaint on the ground that by a recent decision of the general term of this court, a tax payer could not obtain an injunction for any damage which was common to all the tax payers in the city, and that the complaint in such a case must be filed in the name of the attorney-general of the state.

The decision referred to, is given in the opinion of Judge BALCOM in regard to the sale of the Fort Gansevoort property. (*Ante*, pp. 138, 139.)

SUPREME COURT.

MONTECARBOIS agt. MUNDEL.

Where the plaintiff had ten days to reply to the answer on payment of \$10 costs; and instead of serving his reply and paying the costs within the time, he noticed the cause for trial at the circuit, without a reply; *Held*, on motion for judgment for want of a reply, that the plaintiff pay the costs of the circuit—the \$10 before ordered, and \$10 costs of this motion, and serve his reply in three days.

THIS was a motion for judgment for want of reply to answer. The plaintiff was to have ten days to reply, on payment of \$10 costs. The plaintiff did not reply, but noticed case for trial.

MITCHELL, Justice. The plaintiff should have tendered his reply with the \$10 costs, at least before he noticed the cause for trial. Instead of that, he went to the circuit with the plead-

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ings ready for trial, but without a reply, and the reply is since drawn and sworn to. He is in default, and should now pay the costs of the present circuit—the \$10 before ordered, and the costs of the present motion, \$10—and serve his reply in three days from notice of this order, and the adjustment of the costs. The cause may there remain on the calendar, but not to be tried at this circuit, without the consent of the defendant. Defendant may have leave to apply to postpone the trial still further. If he chooses to move to that effect, let the defendant enter and serve notice of the order.

SUPREME COURT.

WM. S. TOOLE and others agt. LEVI COOK and others

The *maker* of a promissory note loaned to the payee, for the use of and sold by the latter, as business paper to a third party, cannot set up the defence of *usury*, to the payment of the note, where the payee, if any one, was the only person who paid any extra interest.

Where there has been a regular judgment by default, upon a promissory note, upon due service of process, and execution issued to the sheriff, the defendant's application to be let in to defend, on the ground of *usury*, comes too late. He should at least, have waked up before the call of the sheriff with the execution.

New-York Special Term, October, 1857.

MOTION by defendant to open a judgment by default, and for leave to defend, &c.

_____ for defendants.

_____ for plaintiffs.

ROOSEVELT, Justice. The note sued on was purchased *bona fide* as business paper. No *usury* was contemplated or intended. The transaction on its face exhibited nothing to cre-

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ate suspicion. If any extra interest was paid, it was not paid by the makers of the note. *They* had delivered it to the payees to make such use of, (for aught that appears,) as the payees saw fit. Nor do the defendants now pretend, of their own knowledge, that any usury was exacted even of the payees. They are "informed and believe," they say. Who was their informant, and where is *his* affidavit? Men believe easily what they wish strongly. Such belief unsupported is of little value, especially to open a regular judgment and establish a penalty or forfeiture; and that too against an innocent party. Men who would punish the faults of others, must be careful not to allow defaults themselves.

These defendants were duly notified on the 5th of August, of the commencement of the suit on the note, and that unless they put in a defence in twenty days, judgment would be taken against them for the amount specified in the summons. The summons was a very simple document; intelligible—and intended by the Code to be so—to the commonest understanding. No misapprehension in that respect, is or could be pretended. And yet the defendants, although thus explicitly warned, took no steps by way of defence for more than sixty, instead of twenty days. They did not even suggest to their attorneys that they had any defence, and not until roused by the call of the sheriff with a regular execution against their goods, did they wake to the consciousness of an undefined belief in the existence of some supposed usurious act, which it was their duty to punish and profit by.

They are too late on such papers. The application, it is almost admitted, could not have been entertained for a moment, as the law stood prior to the act of 1837, an act, which it is said, has reversed all previous rules on the subject, and made the defence of usury an object to be "selected for special favor." On that statute the defendants rely. They forget, however, that *they* are not the "borrowers." *They* loaned the note, if their own version be correct, to Cross & Hoyt. If they are compelled to pay its full face, they will have a remedy over for the full face against Cross & Hoyt. Now, the statute re-

lied on, is for the relief of the oppressed "borrowers." It is they that pay the "shave," so called. The statute says, that "whenever any borrower," shall apply for relief, it shall not be necessary "for him" to pay "any interest or principal."

Such is the language of the act, and such is the construction put upon it, by the court of appeals. I cannot, therefore, consistently with established precedents, let the defendants in. The plaintiffs in such a case, have a right to the benefit of their own diligence, and of the defendants' laches. *Lex vigilantibus, non dormientibus*. No injury is done to the defendants, they are merely compelled to pay what they had promised to pay, and what when paid, they can recover in full from the friends whom they had obliged—the precise remedy which they contemplated when the note was given.

Motion to vacate the judgment obtained by plaintiffs, denied.

SUPREME COURT.

FLETCHER WILLIAMS agt. JACOB VAN VALKENBURG.

Where a plaintiff undertakes to obtain a judgment against a defendant, without any appearance by the latter, either in person or by attorney, he should be required at his peril to bring such defendant *within the jurisdiction* of the tribunal in which he is proceeding, or his proceedings should be set aside as irregular, and totally defective and void.

Therefore, where the service of the summons and complaint was made by an agent of the plaintiff, not an officer of the court, upon the *father* of the defendant, supposing him to be the defendant in the action, and judgment was entered against the defendant upon an affidavit of personal service of the summons and complaint;

Held, that although it appeared that the defendant subsequently received the summons and complaint from some member of his father's family, he did not appear in the action, and no action by such service, was commenced against him, and consequently, the judgment and execution were entirely irregular and defective, and were set aside for want of jurisdiction.

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The proceeding was a hostile one as respected the defendant, in no respect, for his interest; and the law does not go the length of compelling a party either to give his adversary notice of such defects, (service of process, &c., on the wrong person,) or to confess jurisdiction. He might be held to waive a mere irregularity, by not proceeding the first opportunity to correct it, but not a jurisdictional defect. (*The case Anonymous, 4 How. 112, is overruled.*)

The question of an *unauthorized appearance* by an *attorney*, examined and discussed.

Seventh Judicial District, General Term, June, 1858.

Present, WELLES, SMITH and JOHNSON, Justices.

APPEAL from order denying motion to set aside judgment.

The judgment was duly entered on the 3d of December, 1857, upon affidavits showing the service of summons and complaint in the action, on the defendant personally, on the 12th of November, previous; that there had been no appearance on the part of the defendant, and no answer or demurrer received by the plaintiff's attorney. By the affidavits read upon the motion, it was shown on the part of the defendant, that he had no knowledge of the entry of the judgment, until the 28th of December, when the sheriff called upon him with the execution, and that no summons or complaint had ever been served on the defendant, but that they were served on James L. Van Valkenburg. On the part of the plaintiff, it appeared that James L. Van Valkenburg was the father of the defendant, and that both lived at the same house; that the summons and complaint were served by one Flint, who was not an officer, but who was employed by the plaintiff's attorney to make the service; that Flint was not acquainted with the defendant or with James L. Van Valkenburg; that on the 12th of November, he went to the house where the defendant and his father lived, and inquired for the defendant; that he found a person there, who upon inquiry, said his name was Van Valkenburg, and as Flint understood, that he was the defendant; and that Flint served the summons and complaint upon that person, supposing him to be the defendant. It appears, however, by the affidavit of James Van Valkenburg, that he was only inquired of whether his name was Van Valkenburg,

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and that on his answering in the affirmative, Flint handed him the papers and left, before he ascertained what they were, or who they were for.

It further appeared, that soon after Flint left, the defendant came home, and that the summons and complaint were then handed to him by some member of the family, and he was informed that they were intended for him, and that he took them and went and consulted counsel, who advised him that no action was commenced against him, by such service, and to pay no attention to it, until he got ready to pay the note on which the action was intended to be commenced. It also appeared, that neither the plaintiff's attorney nor Flint, knew or suspected that the summons and complaint had not been served upon the defendant, until a short time before the papers in the motion were served, and that the affidavit of service upon the defendant was made, and the judgment entered in good faith. It also appeared, that a short time previous to the service of the motion papers, the defendant offered to pay to the plaintiff and tendered the amount of the note, but declined paying the costs of the judgment, or the sheriff's fees, and then first disclosed to the plaintiff and his attorney, the fact that the summons and complaint had not been served upon the defendant, but upon his father. This offer was not accepted by the plaintiff, and the motion papers were served a day or two afterwards. Nothing was shown upon the subject of the solvency of the defendant, or any of the other parties to the transaction, and the defendant makes no affidavit of merits. The justice at special term denied the motion, and the defendant appealed to the general term.

S. K. WILLIAMS, *for plaintiff.*

WM. CLARK, *for defendant.*

By the court—JOHNSON, Justice. It is an elementary principle, that no court can render a valid judgment against any person until it has acquired jurisdiction of his person, either by the service of process upon him, or by his voluntary ap-

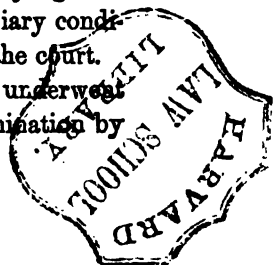
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pearance without process in some mode prescribed by law. The want of such jurisdiction, when ascertained, avoids the judgment and renders it a nullity. And the rule is the same whether the court rendering the judgment, be one of superior or of inferior jurisdiction. No man can be divested of any right, until he has had an opportunity of being heard. (*Bloom agt. Burdick*, 1 *Hill*, 180.)

Whenever the absence of all authority to render the judgment, is made to appear, the court will, as a general rule, set it aside upon motion. To this general rule the courts have established an exception, which still prevails in cases where an attorney has appeared for a party to the action or proceeding. In such cases, courts have refused to set aside the judgment, even when it is made to appear that no action was ever commenced, and that such attorney appeared without any authority whatever from the party, unless it was also shown, that the attorney so appearing was irresponsible, so that no adequate remedy could be had by the party against him. (1 *Salk.* 88; *S. C.*, 6 *Mod.* 16; *Denton agt. Noyes*, 6 *Johns.* 296; *Meacham agt. Dudley*, 6 *Wend.* 514; *Grazebrook agt. McCreddie*, 9 *id.* 487; *Adams agt. Gilbert*, *id.* 499.)

Numerous cases might be cited to the same effect, both in our own and the English courts, were it necessary. It is enough that the rule in such cases is well settled, and is still adhered to, both in this state and in England. In the *Anonymous case* in 1 *Salk.* and 6 *Mod.* the court said: "If an able and responsible attorney appear for another, without a warrant, and judgment is against him, the judgment shall stand, and the party shall be put to his action against the attorney, but if the attorney be a beggar, or in a suspicious condition, the court will set aside the judgment." This distinction has been adopted by our courts in this state, and thus by a strange confusion of ideas and principles, the validity of a judgment in such a case, has come to depend upon the pecuniary condition of the attorney, instead of the jurisdiction of the court.

In the case of *Denton agt. Noyes*, (*supra*), which underwent an elaborate discussion by counsel, and much examination by



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the court, KENT, Chief Justice, who delivered the opinion of the majority of the court, admits that "the cases may not seem correct, if we were to reason from first principles." Yet, he says, "if the rule appears to be settled, we are not at liberty to reason in that way." In that case, however, while the court refused to set the judgment aside, although no writ had been served, and the attorney had no authority to appear for the defendant, because it did not appear that such attorney was insolvent, the court made a very important change in the then prevailing rule in such cases. While they ordered the judgment to stand, it was only by way of security, and the defendant was permitted to come in and plead the general issue, and give notice of any special matter which could be pleaded in bar, and could not be given in evidence under the general issue. This was a wide departure from the English rule, to which the court professed to adhere. And while the court felt itself constrained thus to modify the existing rule, to prevent to some extent, the wrong and injustice which might so readily be practiced under it, it is quite obvious that they added another error to the original one. They virtually compelled a party to come into court and submit himself to its jurisdiction, and defend an action, which confessedly had never been commenced against him, by a process unknown to the law, under the penalty, in case of refusal, of being compelled to submit to a judgment, which the court in fact, had no authority to render. It was said in that case, as it has been in several others, that an appearance by an attorney of the court without warrant was good as to the court. But it is impossible to see how the unauthorized act of an attorney of the court ever could give such court any jurisdiction over the person of the party whose name was thus fraudulently placed upon the records?

Reasoning "from first principles," it is clear that an attorney who has no authority to appear for a party, cannot by a mere unauthorized appearance, confer any jurisdiction upon any court over such party. But it may be, and I admit that in the case of an appearance by an attorney of the court, without

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warrant, the rule is now so firmly settled, that "we are not at liberty to reason in that way." It is unfortunate, I think, that our court in the leading case of *Denton agt. Noyes*, instead of undertaking to modify the rule so as to make it less intolerable, did not disregard it altogether, and adopt the dissenting views of VAN NESS, Justice, whose reasons upon the original question are entirely conclusive. The exercise of judicial authority would have been scarcely greater in the latter case than in the former. The original error in the creation of the rule, and the danger to which persons are exposed under it of having false and fraudulent judgments imposed upon them to attach to their property, which may ultimately divest them of it, are sufficiently obvious and require no comment. I do not, however, propose at this day, to abrogate the rule as it now stands. I have thus far adverted to it, because its authority has been invoked to sustain this judgment, and for the purpose of showing that the rule is so entirely at variance with all sound and just principles, and so liable to abuse, that it ought not to be extended to new cases. Thus far it has only been applied to uphold judgments of this character where a *responsible* attorney has undertaken to appear for the party against whom the judgment was rendered without warrant. And even then, if there was fraud or collusion between the attorney for the plaintiff, and the attorney who undertook to appear for the defendant, the court would set the judgment aside, without inquiring whether the attorney of the latter was a "beggar," or a millionaire.

In the case before us, no one has undertaken to appear for the defendant. The acts and proceedings by which the judgment was sought to be procured, were all those of the plaintiff, and the agents and attorneys employed, were exclusively his. If the defendant's father misled the agent of the plaintiff, by personating the defendant, or by permitting the summons and complaint to be served upon him without undeceiving such agent, there is nothing in the papers to show that the defendant was privy to the deception. Neither the plaintiff's agent who served the papers, nor the person upon whom the service

was made, are in any sense officers of this court. Their acts are in no respect official acts, and there is no rule which prevents the court going behind them.

They are not good as to the court within any adjudged case in this court, and I think we are bound to go behind them, and declare them void as to the defendant. Where a plaintiff undertakes to obtain a judgment against a defendant, without any appearance by the latter, either in person or by attorney, he should be required at his peril to bring such defendant within the jurisdiction of the tribunal in which he is proceeding, or his proceedings should be set aside as irregular and totally defective and void. There may be cases where the defendant would be estopped from denying that a service similar to the one in this case, was a good service upon himself. As where he should procure another to personate him, for the purpose of misleading and avoiding personal service. But this is not such a case. All the defendant did was to remain silent. He omitted to give the plaintiff notice of his mistake, but he did not thereby adopt the service of the summons and complaint. The proceeding was a hostile one, as respects the defendant, in no respect for his interest, and the law does not go the length of compelling a party either to give his adversary notice of such defects or to confess jurisdiction. He might be held to waive a mere irregularity, by not proceeding the first opportunity to correct it, but not a jurisdictional defect.

It is no answer to say that the defendant has no merits. The question is, whether the plaintiff has any valid judgment. If the plaintiff never commenced an action and thus brought the defendant within the jurisdiction of the court, it could pronounce no valid judgment, and the judgment, which in theory, it undertook to pronounce, is a nullity. The question whether the defendant is really indebted to the plaintiff upon a note or otherwise, and to what extent, has nothing to do with the matter before us. It is claimed, however, on the part of the plaintiff, that there was in fact, a personal service of the summons and complaint upon the defendant; that inasmuch as they are shown to have come to his possession, after they

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were served upon his father, it is to be regarded as service upon him; and several English cases are cited in support of the proposition. (*Emerson agt. Brown*, 7 *Man. & G.* 476; *Rhodes agt. Innis*, 7 *Bing.* 329; *Philips agt. Ensell*, 2 *Dowl. Pr.* 784; *Williams agt. Piggott*, 1 *M. & W.* 574.)

These, and other cases, do hold substantially that where there has been an attempt to make service of process upon the defendant, which has failed by reason of service being made by mistake upon another person, or by reason of the defendant's refusing to receive it, where he has kept out of the way, and it has been left with some one for him, if such process afterwards actually came to his possession, it is a good personal service. And the courts there have refused to set aside the judgment on the ground that no process has been served, unless in addition to the want of service, it is also made to appear on the part of the defendant, that such process had not come to his knowledge. But I apprehend that this is not now the practice of the English courts. Or at all events that the practice is not uniform in all the courts. In *Goggs agt. Lord Huntingtower*, (12 *M. & W.* 502,) on motion for leave to enter the defendant's appearance, it was shown by the plaintiff's attorney, that after several ineffectual attempts to serve the defendant with a copy of the writ of summons, he went to his residence, and was informed by a servant, over the garden wall, that her master was not at home; that he then stated to her, that he would leave a copy of the writ for her master, whereupon she put a basket over the garden wall with a string attached; that he put a true copy of the writ in the basket, and requested the servant to give it to the defendant, which she promised to do; that immediately afterwards he heard the defendant say to the servant, "take it back, I won't have it." The affidavit also stated, that the defendant saw the servant on a subsequent day, who informed him, that she had given the copy to her master. In support of the motion, the cases above referred to were cited. PARKE, B., said: "In consequence of those decisions, the judges have come to a determination that in future there shall be no equivalent for a personal service."

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And ALDERSON, B., said: "Service means serving the defendant with a copy of the process, and showing him the original if he desires it." The court refused the rule, thus overruling *Williams agt. Piggott*, in the same court, and disregarding all the former cases. The Code prescribes how an action shall be commenced and how the summons shall be served. (§§ 127, 184.) The action must be commenced by the service of a summons, and such service in all cases, except when the action is against a corporation, an infant under the age of fourteen years, or a person judicially declared to be of unsound mind, must be made by delivering a copy of the summons to the defendant personally. This service may be made by any person not a party to the action. (*Section 133.*)

But to constitute a service, it must be delivered by some one at the request of the plaintiff or his attorney, or who is acting under his authority. A mere casual delivery by a person having no authority from the plaintiff, or his attorney, to make the service, would be no service within the meaning of the Code, and would not constitute the commencement of an action. The service here was clearly not upon the defendant, but upon another person, who was supposed by the plaintiff's agent to be the defendant. The defendant had no agency whatever in misleading the plaintiff's agent. The summons came to the defendant's hands casually, and not as a service from the plaintiff.

There is but one case in this court, that I have been able to find, where a judgment without process served, or an appearance by an attorney, has been upheld. That is an *anonymous* case in 4 *How. Pr. Rep.* 112. The sheriff in that case, undertook to serve a *capias* upon the defendant, but served it upon another person, and returned it served upon the defendant. There was a judgment by default, and the court refused to set it aside on motion of the defendant, there being no affidavit of merits, and held that as between plaintiff and defendant the judgment was regular, and that the return of the sheriff was matter of record, "and could not be impeached in that collateral way." This was a decision at special term, and does not

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appear to have undergone any consideration. The ruling goes beyond any former case, and puts the false return of a sheriff to a *capias*, upon the same footing with an unauthorized appearance by a responsible attorney. Besides, it was a mistake to suppose that the return was attacked collaterally. It was a direct proceeding to set aside the judgment, and the return was unquestionably false. I think that decision is not law, and that it ought not to be followed. It does not come within the reasons which have prevailed in former cases. It makes a false return conclusive against a defendant, without reference to the adequacy of his remedy against any one. The rule should not be extended. I am of opinion, therefore, that no action has been commenced against the defendant, and that consequently the judgment and execution are entirely irregular and defective, and must be set aside.

COURT OF APPEALS.

BEHAN, plaintiff in error agt. THE PEOPLE, defendants in error.

In the passage of the act entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16th, 1857, it was not the design of the legislature to limit the punishment of the violation of the act, to the penalty imposed therein, but to authorize a proceeding by complaint before a magistrate, or by *indictment*.

BEHAN was indicted and convicted, at the Onondaga general sessions, of the offence of selling strong and spirituous liquors and wines, without having any license therefor, under chapter 628 of 1857, § 13, being the act to suppress intemperance and to regulate the sale of intoxicating liquors. The judgment was on appeal affirmed by the supreme court, at general term in the fifth district, and the defendant appealed to this court.

By the court—PRATT, Justice. It is well settled, that where an act is prohibited by statute, which is not criminal at common law, and a penalty is imposed in the same statute, declaring such prohibition, the act is not indictable. The principle was distinctly recognized in the case of *The People agt. Smith*, (18 Wend. 341.) It is based upon the assumption that the legislature, having fixed the penalty, at the same time of prohibiting the act, designed that there should be no other punishment. But where the act was criminal at common law, or already prohibited by a former statute, the imposition of a civil penalty, would not take away the power to punish by indictment. So, when the statute itself contains any provisions showing that the legislature did not intend that the civil penalty should constitute the only punishment, the remedy by indictment would not be taken away.

Hence, if a statute direct that the prosecutor may proceed in a certain way, or otherwise, as "if a statute give a recovery by action of debt, bill, plaint or information or otherwise," it authorizes a proceeding by indictment. (*Arch. Cr. Pl.* 1, 2; *Hawk. chap.* 25, § 4; *Griffith agt. Wells*, 5 Denio, 227.)

In fine, it is simply a question of legislative intent. In looking, therefore, at the statute in question, in its whole scope and bearing, and in connection with previous legislation upon the same subject, can we infer an intention on the part of the legislature to confine the remedy for a violation of its provisions in selling without license, to the civil penalty therein imposed, or is the intention manifest that the offender shall also be punishable by indictment? Upon a careful examination of the statute, it seems to me that the conclusion is irresistible, that the latter was the intention of the legislature.

It has been the policy of the state, at least since the year 1801, if not before, to make offences against the excise laws, punishable by indictment. By the 17th section of the act of 1801, to lay a duty on strong liquors, "and for regulating inns and taverns," all offences against any of the provisions of the act were declared to be misdemeanors. This provision has been continued from that time down to the enactment of the

prohibitory law in 1855. The presumption, therefore, is against the design on the part of the legislature in the restoration of the license laws, to change a policy so long adhered to. It should require a clear expression of the legislative will to that effect to justify the courts in holding that offences against those laws are no longer indictable.

The act under consideration, in its leading characteristics, is very similar to the old excise laws, both in its prohibitions and its penalties. Under those laws, the selling in quantities less than five gallons, was prohibited by penalties in substantially the same form as in the present act; and the supreme court, in the cases of *The People agt. Stevens*, (18 Wend. 341,) and *The People agt. Brown*, (16 Wend. 561,) held, that selling the prohibited quantities without license, were offences against the provisions of the act, and therefore misdemeanors, and indictable.

If, therefore, selling without license, constituted offences against the provisions of that act, it is difficult to find any good reason why similar violations of the present statute should not also be deemed offences against its provisions. And if they are to be deemed offences, no one will deny that they are indictable.

2d. The whole scope and character of the act shows that the term *offence*, when it is used in connection with those directions which are only applicable to misdemeanors, is not used in a limited sense, but was used to define all substantial violations of the provisions of the act.

By section 16, it is made the duty of certain officers therein enumerated, to arrest "all persons found actually engaged in the commission of *any offence in violation* of this act, and forthwith to carry such person before any magistrate, &c.," who is to try them, or hold them to bail, as for any other misdemeanor triable by a court of special sessions.

In a subsequent part of the same section, it is made the duty of "the magistrate to entertain *any complaints of a violation of this act* made by any person under oath, and forthwith to issue a warrant and cause such offender to be brought before him to

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comply with the provisions of this section, &c." Here the term used is "*any complaint of a violation of this act*," and upon such complaint being made, a warrant is to be issued. The term "offence," which the counsel for the prisoner insists only means those violations of the laws declared in the act itself to be misdemeanors, is not used, but the more general term "*violation of this act*," and the proceedings directed to be taken by the magistrate are such as are applicable to cases of misdemeanors only.

So by section 29th, it is made the duty of courts "to instruct grand jurors to inquire into *all offences* against the provisions of this act, and to present all offenders under this act." Now it is not to be assumed that the legislature would have inserted, so carefully in the act, these special directions to police officers, magistrates and courts, in order to secure extraordinary vigilance in the detection and conviction of offenders against the three or four comparatively unimportant provisions of the act, which are specially declared to be misdemeanors.

3d. The act of selling without license, is called in those sections of the statute imposing the penalties, *offences*.

By section 13th, it is declared that "whoever shall sell any strong or spirituous liquors or wines, in quantities in less, &c., shall forfeit \$50 for *each offence*." By section 14th, "whoever shall sell, to be drank in his house, &c., shall forfeit \$50 for *each offence*." In fine, all through the statute, violations of the provisions of the act are termed *offences*. And it is a primary rule, for the interpretation of statutes, that when the same term or expression is used in different parts of the same statute, it shall be deemed to have the same meaning, unless the contrary very plainly appears to have been the intention of the legislature. (*Smith on Statutes*, 673; *James agt. Dubois*, 1 Har. 285.)

The general statutory definition, as given in the Revised Statutes, which is invoked by the prisoner's counsel in aid of the construction insisted upon by him, throws but little light upon that point. By that statute, the term offence when used in a statute, shall be construed to mean any offence for which any criminal punishment may by law be inflicted. Now, the

question in controversy is, whether this particular violation of the act is punishable criminally? If so, the term offence applied to it, would be in strict accordance with the statutory definition of the term. Again; as it already appears, the act itself calls this violation *an offence*. Now, if the statutory definition of that term is of any force whatever to settle the question under examination, it is against the construction contended for on behalf of the prisoner. For the term when used in any statute, is to be construed to mean any offence for which any criminal punishment may be inflicted. (2 R. S. 886, § 87.)

4th. The only reasons which have been suggested in opposition to the views above expressed, worthy of consideration, are based upon the fact that the act itself declares some three or four of the violations of its provisions misdemeanors. It is insisted that the maxim, "*expressio unius est exclusio alterius*," in its legal application to this statute, would exclude the assumption that any other offences were designed to be deemed misdemeanors. In a statute which appears to have been carefully drawn up, and all its provisions carefully considered, I should be inclined to give great force to that maxim. But the statute under consideration, appears upon its face to have been very carelessly framed, and to have been adopted without a very careful consideration of its provisions. In such case it would not be safe to give that maxim much force. It would be much safer to look at the general scope and purpose of the act, and to search there for an expression of the legislative intention. And in looking over all the provisions of the act in their general scope and tenor, I cannot resist the conviction that offences against its provisions were designed to be punishable as misdemeanors.

Upon the whole, we are satisfied that it was not the design of the legislature to limit punishments of the violation of the act in question, to the penalty imposed therein, but to authorize a proceeding by complaint before a magistrate, or by indictment.

The judgment was affirmed.

SUPREME COURT.

ARNOLD and others agt. RINGOLD and wife.

A married woman sued with her husband, in respect to her separate estate, may put in a separate *demurrer*.

The acts of 1848 and 1849, have made no change with regard to the personal liability of a married woman; where she has a separate estate, her obligations incurred on the faith of it, or for the benefit of it, are enforced, where capable of being enforced, as a *charge*, and never as a personal liability. But it is essential that it should expressly appear that she charged her separate estate; this is the *gravamen* of the claim.

When in general language it is declared that "a married woman cannot make a contract," it is meant that she cannot make a contract charging herself *personally*. But she can incur a debt by the purchase of goods or any other obligation, and such are contracts, and make them a charge on her separate estate, although she may not be *personally* liable.

New-York Special Term, April, 1858.

DEMURRER to complaint.

_____ for defendants.

_____ for plaintiffs.

CLERKE, Justice. It is objected by plaintiff's counsel, that a married woman cannot put in a separate demurrer without leave of her husband. This, perhaps, contains the general rule, where she is merely joined as a defendant formally with her husband; but where she is proceeded against in respect to her separate estate, she must be treated and may act as a *feme sole*, whether her husband is or is not united with her in defence of the action. If the rule was so rigorous as the counsel contends; a married woman when sued by her husband, as in some cases she can be, would be under the necessity of asking permission to do what it probably would be against his interest to grant, and she would thus be entirely in the power of her opponent, placing her separate rights practically at his disposal.

Arnold and others agt. Ringold and wife.

The acts of 1848 and 1849, have made no change with regard to the personal liability of a married woman. Where she has a separate estate, her obligations incurred on the faith of it, or for the benefit of it, are enforced when capable of being enforced, as a *charge*, and never as a personal liability. But it is essential that it should expressly appear that she charged her separate estate; this is the *gravamen* of the claim, and is indispensable to the remedy, which the plaintiff asks the court to afford.

In the complaint before me, however, this allegation is not only omitted, but it is affirmed that the goods were sold and delivered to the husband; the counsel giving as an excuse for this inconsistent allegation, that an allegation stating that they were sold and delivered to the wife, would have been bad, as she cannot make a contract. This is a mistake, and a very common mistake. When in general language it is declared, that "a married woman cannot make a contract," it is meant that she cannot make a contract charging herself personally. But as we know, she can incur a debt or any other obligation, and make it a charge on her separate estate. And what is this, if it is not a contract? She could, therefore, have purchased these goods from the plaintiffs, and although not personally liable for the payment of them, if she has a separate estate and has expressly charged it with this obligation, (which must be alleged and proved,) the court will enforce its collection, by fixing it as a lien upon her estate, if she has one. The complaint contains no allegations of this nature; but as I have said, contains one inconsistent with the idea that the obligation was incurred by her. She could indeed, charge her estate as security for her husband's obligation, but this is not pretended.

Judgment for the defendants on the demurrer, unless the plaintiffs amend within ten days, and pay the costs of the term.

SUPREME COURT.

EBENEZER HAIGHT agt. ORATOR HOLCOMB.

An *attorney* is entitled to a *lien* upon the judgment for the amount due him for services rendered in the prosecution of the suit, whether as attorney or counsel.

And notwithstanding a settlement of the suit between the parties, the attorney as the equitable assignee of the judgment, to the extent of the amount due him, has a right to enforce payment by *execution*.

Albany Special Term, October, 1857.

MOTION to stay proceedings.

The action was brought to recover a balance claimed to be due upon a special contract. Issue being joined, it was referred to referees, who reported that there was due to the plaintiff the sum of \$722. For this amount, with \$344 costs, making \$1,066, judgment was perfected on the 27th of July, 1857.

The next day the parties met together, and agreed to settle the judgment for \$1,000, for which sum the defendant agreed to execute to the plaintiff, his promissory note, payable in two years. The note was also to be signed by Abel Holcomb and Friend Holcomb. A note was accordingly made by the defendant, and was signed by Abel Holcomb, and was delivered to the plaintiff, who executed a receipt therefor, as follows: "Cairo, July 28th, 1857. Received of Orator Holcomb, his note for \$1,000, which is in full of all demands, &c., on condition that Friend Holcomb signs the above mentioned note with O. and A. Holcomb. EBENEZER HAIGHT."

On the 4th of August, 1857, D. K. Olney, Esq., the plaintiff's attorney, by direction of the plaintiff, served upon the defendant a notice that the note which had been made and delivered on the 28th of July, would not be received, and that the judgment would be collected in due course of law. Mr. Olney, on the same day, served upon the defendant a notice that he claimed to have a lien upon the judgment for \$250.25,

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for his costs, counsel fees and disbursements, in the action. An execution to the sheriff of Greene, was also issued on the same day.

On the 28th day of August, the plaintiff and defendant again met, and agreed upon another settlement, which was reduced to writing, and indorsed upon the receipt given on the 28th of July, as follows: "It is agreed that the judgment in the supreme court, in favor of Ebenezer Haight against O. Holcomb, shall stand as security for the payment of the within described note, and that the signature of Friend Holcomb to the note is waived."

(Signed,)

"E. HAIGHT,

"O. HOLCOMB."

At the time this settlement was made, the plaintiff was informed of the notice which had been served upon the defendant by his attorney, and he then claimed and insisted that he had a good defence and set-off against any claim or demand which his attorney had against him for costs and counsel fees in this action. The plaintiff at the same time, agreed that the execution might be withdrawn, upon payment of the sheriff's fees, and the defendant accordingly paid to the sheriff his fees, amounting to \$25. The sheriff refused to return the execution, but insists upon collecting thereon the sum of \$250, and has been indemnified for so doing by the plaintiff's attorney.

Upon an affidavit of the defendant, setting forth these facts, and a further affidavit of the plaintiff in which he denied that he was indebted to his attorney in any amount whatever for his services, the defendant moved for an order setting aside the execution or staying all further proceedings thereon.

Affidavits were read in opposition to the motion, tending to show that there was due to Mr. Olney for his costs and counsel fees in this action, the sum claimed in his notice of the 4th of August.

S. A. GIVENS, *for motion.*

D. K. OLNEY, *opposed.*

HARRIS, Justice. The settlement upon which the defendant now relies to defeat the execution, was made on the 28th of August. He had before that had notice of the lien claimed by the attorney. If, therefore, the attorney had a lien upon the judgment for his services, the defendant is not in a situation to claim protection on the ground that when he made the settlement, he was ignorant of such claim.

It was a well settled doctrine before the Code, that although costs were in form recovered by the prevailing party, and became a part of the judgment in his favor, yet the attorney was to be regarded as an equitable assignee to the extent of his costs, and his rights as such assignee would be protected. (*See Williams agt. Batterman*, 4 Barb. 47, and cases cited.)

Nor can I perceive that the doctrine has been changed by the Code. A reference to the first title of the chapter of the Revised Statutes, relating to costs, (2 R. S. 612,) will show that costs, under the former system of proceedings, were always recovered as they are now, by the prevailing party in the action. The third title of the same chapter, prescribed the fees of various officers of the court, including among others, attorneys and counsellors. These fees, upon taxation, became a part of the costs recovered by the party. So now, certain allowances are made to the prevailing party, which are called costs. The rates of these allowances have been changed, but as before, they are recovered by the party, and become a part of his judgment. The great change which the Code effected in this respect, was the repeal of all statutes fixing the compensation of attorneys, solicitors and counsellors, and leaving the amount open to contract between the parties in each particular case. The fee bill is no longer a criterion by which the amount to which the attorney is entitled can be determined. He is now entitled to receive, not the sum which has been allowed to his client for costs, but such sum as he has agreed to receive, or in the absence of an express agreement, such sum as his services were worth.

But in all this, I can see no reason why the attorney should not have the benefit of the former doctrine, that he is to be re-

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garded as the equitable assignee of the judgment to the extent of his claim for services. The mode in which the extent of his interest is ascertained is changed, but the grounds upon which the courts act in protecting that interest, are unchanged. (See *Sherwood agt. The Buffalo and New-York City Railroad Company*, 12 How. 186; *Sweet agt. Bartlett*, 4 Sand. 661; *Ward agt. Wordsworth*, 9 How. 16; 1 *E. D. Smith*, 598.) In the latter case, the question directly before the court was, whether the lien of the attorney for his services had been abolished by the Code? The whole subject has received at the hands of Judge DALY, a more complete and thorough examination than I have met with elsewhere. The opinion itself is a fine specimen of juridical learning and sound argument. "All that the Code has done," says the learned judge, "has been to abolish the fee bill, and take away all restraints upon attorneys making agreements with their clients for their services. It has left the attorney to agree with his client for a greater or less sum than is given to the party, by way of indemnity for his expenses; but I cannot see how this legislation can be regarded as abolishing or affecting the attorney's lien. He did not derive it from these statutes. It existed long before any fee bill was enacted. The right to a lien for services rendered is one thing, and the measure by which the value of these services is ascertained, is another. The latter has been the subject of statutory enactment, the former has not. The statute has not interfered with the right of lien, except to limit the extent of it; and when that limitation is removed by the repeal of all statutes regulating the fees of attorneys, the right of lien, upon the authority of adjudged cases, stands precisely as it stood before."

My conclusion in this case is, that Mr. Olney is entitled to a lien upon the judgment for the amount due him for services rendered in the prosecution of the suit, whether as attorney or counsel, and that notwithstanding the settlement between the parties, as the equitable assignee of the judgment to the extent of the amount due him, has a right to enforce payment by execution.

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Before making a final order upon the motion, and for the purpose of ascertaining the amount justly due to the attorney for his services as attorney and counsel in the action, I shall direct a reference to inquire and report upon that fact. An order will be entered appointing Rufus H. King, Esq., a referee for that purpose, and directing that the further hearing of the motion stand over until the coming in of the report.

SUPERIOR COURT.

JAMES T. DUIGAN, respondent agt. ROBERT HOGAN, appellant.

By the terms of section 47 of title 10, chapter 8, part 3 of the Revised Statutes, in an application for the dispossession of a *tenant*, upon certain specified allegations, the *landlord* may require that the tenant be summarily removed. The tenant may interpose certain specific grounds of resistance. The issues made between them shall be tried by a jury. Upon a determination in favor of the landlord, he shall be put in possession; and neither by writ of *certiorari*, (although the proceedings may be reviewed by *certiorari*), nor by any other writ or order of any court or officer, (by injunction or otherwise,) shall the *proceedings be stayed*.

There is no inconsistency between section 219 of the Code and the said 47th section of the Revised Statutes. The Code provides, that where a case is made upon which, by existing laws, the plaintiff will be entitled to an injunction, he may have an injunction *pendente lite*. And by the 47th section of the Revised Statutes, the court are in substance forbidden to grant an injunction staying the proceedings arising under that act.

In this case, it appeared that a warrant of dispossession had been issued in favor of the landlord against the tenant by the magistrate after a trial by jury, on proceedings instituted by the tenant, and a judgment in the landlord's favor.

The tenant brought his action against the landlord, and in his complaint prayed that the performance of the *covenant to repair* be adjudged a condition precedent to the defendant's right to rent, or to institute proceedings to dispossess; that the expenses to which the tenant had been subjected, be adjudged payment of the rent; and that he have judgment for the damages sustained by the landlord's neglect to repair; that the landlord be directed to put the premises in repair, &c.; and that in the meantime the landlord be restrained by injunction from taking any warrant to dispossess the plaintiff, &c.

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Held, that the plaintiff had mistaken his remedy; he should have paid his rent, and if he had a just claim against the defendant, sue and collect it; there was nothing new in this course.

General Term, May, 1858.

Before BOSWORTH, HOFFMAN, SLOSSON, WOODRUFF and PIERREPONT, *Justices.*

APPEAL from order at special term granting an injunction.

The complaint of the plaintiff, fortified by affidavits on his behalf, represented in substance, that the defendant leased thirteen dwelling-houses, then out of repair, to the plaintiff, and covenanted that he would put them in complete repair; that the defendant neglected and refused to make such repairs, and that the plaintiff had sustained great damage thereby, and had been himself put to expense in making repairs that were necessary; that the making of such repairs was a condition precedent to the defendant's right to claim any rent; that the plaintiff was entitled to apply such expenses on account of the rent, and to be allowed such damages in extinguishment of the rent which had accrued; that the defendant, nevertheless, upon the allegation that the rent for the quarter ending the first of April last, was in arrear and unpaid, had instituted proceedings under the act authorizing summary proceedings for the dispossession of a tenant holding over after non-payment of rent, before a magistrate, who refused to permit the said matters to be given in evidence, and on the trial gave judgment that the plaintiff be dispossessed; and the defendant threatens to apply for, and the justice threatens to issue a warrant to put the landlord in possession of the demised premises. The complaint prays that the performance of the covenant to repair be adjudged a condition precedent to the defendant's right to rent, or to institute proceedings to dispossess; that the expenses to which the plaintiff has been subjected, be adjudged payment of the rent, and that he have judgment for the damages sustained by the defendant's neglect to repair; that the defendant be directed by the judgment to put the premises in repair, &c.; and that in the meantime the defendant be

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restrained by injunction, from taking any warrant to dispossess the plaintiff, &c.

The answer of the defendant showed that a warrant for the dispossession of the plaintiff had been actually issued to put the defendant in the possession of the demised premises, and was already in the hands of the constable for execution; that it was issued by the magistrate after a trial by jury, in the proceedings instituted by the defendant, and after a full hearing upon the matters in controversy in those proceedings, and a judgment in the defendant's favor therein.

The answer further denied the several allegations in the complaint, upon which the claim of the plaintiff to be allowed for expenses and damages, by reason of the alleged want of repairs was founded; avers that the defendant performed his agreement by putting the premises in repair according to the terms of the lease, &c. The answer was also corroborated by affidavits annexed, on behalf of the defendant.

Upon an order to show cause, an order was made at special term, that upon condition that the plaintiff deposit the amount of rent in arrear, to abide the event of this action, with a further amount to cover any costs which may be awarded to the defendant, the defendant be enjoined from issuing or serving any warrant to dispossess the plaintiff, or taking any other proceedings to dispossess him of the demised premises.

From this order the defendant appealed to the general term.

NELSON SMITH, *for appellant.*

JOHN W. ASHMEAD, *for respondent.*

By the court—WOODRUFF, Justice. By the plain terms of the 47th section, [now 48th section,] of title tenth of chapter 8th, part 3d of the Revised Statutes, proceedings on an application for the dispossession of a tenant under that title, may not be stayed by the writ or order of any court or officer.

The legislature, in granting the remedy furnished by that title, have prescribed with entire precision, what allegations

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must be made on behalf of the landlord, and what issues the tenant shall be permitted to take and submit to the determination of the jury. If those issues are found by the jury against the tenant, the magistrate is imperatively required to issue his warrant to put the landlord in possession.

It is wholly unnecessary for us to inquire what considerations induced the legislature to give the landlords this summary mode of obtaining possession of demised premises, or why they have not enlarged the grounds of resistance or defence which the tenant might interpose to defeat the application. It is enough that it is so enacted, and when the legislature have given a specific defence, and have allowed no other, it is not for any court to say that although no fraud has been practiced, and the tenant has had all the benefit of a fair trial, which the statute has provided for him, there are yet other defences, which had the legislature permitted him to use them, might or ought to have availed him, and upon such conclusion to repeal the statute, and restrain the landlord of his express statute redress.

And again, the statute has prescribed a specific mode of reviewing the proceedings had before the magistrate by certiorari to the supreme court, but their intention that the parties should be permitted to act on the presumption that a determination in favor of the landlord, is according to the right of the matter, and their purpose to make the proceedings in fact what they are in name, *summary*, is shown in their declaring that the proceedings to dispossess shall not be stayed by such certiorari. No allegation of error shall, therefore, prevent the execution of the warrant, even while a review is taking place which may vacate the whole proceedings.

To this is then added the provision for the recovery of damages by the tenant, by reason of the proceedings, in case they shall be reversed or quashed by the supreme court. And finally, no writ or order of any court or officer, shall stay or suspend the proceedings thus authorized. The whole scheme of the statute is this: Upon certain specified allegations, the landlord may require that the tenant be summarily removed.

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The tenant may interpose certain specific grounds of resistance. The issues made between them shall be tried by a jury. Upon a determination in favor of the landlord, he shall be put into possession. And neither by writ of certiorari, nor by any other writ or order of any court or officer, shall the proceedings be stayed. The proceedings may, nevertheless, be reviewed, in a manner prescribed, and if reversed or quashed, the tenant shall be entitled to recover his damages sustained by the proceedings, with costs.

Here is a complete system or scheme, which the legislature thought wise in policy, just in its operation, and if in any case harsh in its effect, still a lesser evil than to permit landlords to be kept out of possession during any protracted litigation into which the tenants might find means to involve them. Although it was not claimed on the argument that this court may, in the face of this statute, and contrary to the provisions of the 47th section, enjoin the landlord, who has succeeded on the trial before the magistrate, and obtained a warrant directing the officer to put him in possession of the demised premises, it is claimed that this statute is modified, and this 47th section is in substance repealed by the liberal provisions of the Code, which confer upon the courts the power to grant injunctions, and section 219 of the Code is referred to, as producing this change.

Section 471 of the Code provides, that the second part of that article, in which the 219th section is found, shall not affect any proceedings under certain specified chapters and titles of the Revised Statutes, of which chapter 8th of the third part is one, except that where any particular provisions of those chapters and titles are plainly inconsistent with the Code, such provisions shall be deemed repealed.

It is therefore obvious, that unless section 219 is plainly inconsistent with the section 47 of the Revised Statutes above referred to, then that section is in full force, and we have no power to enjoin the landlord in the present case. The section of the Code referred to (219) relates solely to temporary injunctions or injunctions *pendente lite*, and the very first condition

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upon which the court is permitted to grant a temporary injunction is, that it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, i. e., if the court can see that if the plaintiff finally establishes the facts he alleges, he will be entitled to the relief demanded, and such relief consists in whole or in part in restraining some act which would produce injury to the plaintiff, then a temporary injunction may be granted. And it necessarily follows that if we can see that on a final hearing, no such injunction can be granted upon the facts alleged, then section 219 does not warrant a temporary injunction.

Whether if the proofs were now all before the court, and the plaintiff had proved the facts alleged, a perpetual injunction could issue, is, therefore, a question which the plaintiff must answer affirmatively before he can ask anything under section 219, which otherwise has no application whatever to his case. That section cannot be invoked to show that on a final decree an injunction may be granted, because it only applies to temporary injunctions. And no section of the Code, nor any other statute, authorizes any court on a final hearing to grant a perpetual stay of proceedings after a warrant has been issued, or to suspend the execution of the warrant in such proceedings between a landlord and his tenant, holding over without paying his rent, and the section 47 already mentioned expressly forbids it. A case is not made, therefore, to which section 219 can apply, because it does not appear by the complaint that the facts, if all that is alleged should be proved, will warrant the court at a final hearing, in granting an injunction.

There is, therefore, no inconsistency between section 219 of the Code, and section 47 of the Revised Statutes. The Code provides, that where a case is made upon which, by existing laws, the plaintiff will be entitled to an injunction, he may have an injunction *pendente lite*. By section 47, the court are in substance forbidden to grant the injunction sought in this case. The necessary consequence is, the case for a temporary injunction contemplated by section 219, is not made out. We

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are, therefore, clear that there is no inconsistency between the Code and the provisions of the statute under consideration, and that the 47th section of the statute is in full force.

It has seemed advisable to express ourselves distinctly on this point, in order that the view of this court may be understood in the apparent conflict of decision which has been exhibited on this question. (*Smith agt. Moffat*, 1 Barb. S. C. R. 65; *Cure agt. Crawford*, 5 Howard Rep. 293; *Woodworth agt. Lyon*, id. 163; *Valletson agt. Seyneth*, 2 Abbott's R. 121; *Hyatt agt. Burr*, 8 Howard R. 168; *Capet agt. Parker*, 3 Sand. R. 662.)

These views do not necessarily conflict with the case of *Forrester agt. Wilson*, (1 Duer R. 624.) The power of the court of chancery under its peculiar jurisdiction to protect a party against fraud, even when such fraud is attempted under the cover of a statutory proceeding, is not involved in the case now before us. The facts in that case do not appear in the report, but I am informed by my brethren, that there the proceedings were taken before a magistrate at a distance of several miles from the premises; that the utmost dispatch was barely sufficient to enable the tenant to reach the place of trial; that although he used all reasonable diligence to arrive in season, and took with him the money to pay the rent and prevent the issuing of the warrant, travelling by the cars, he arrived just as the warrant was signed and delivered, and a moment too late to make the payment. This was deemed sufficient reason for interference, on the ground of undue advantage, fraud or surprise.

Here there is no pretence of fraud or surprise. The tenant claimed that he ought not to pay rent, because the landlord had broken his covenant to repair, and the tenant was entitled to damages. Now, this claim was a defence to the summary proceedings or it was not. If it was, and the magistrate erred in rejecting it, his error may be corrected by a proper review of the proceedings. If it was not a defence, then we can only say that the legislature have practically said, that the landlord shall be permitted to recover possession if the rent is not paid,

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and a warrant of dispossession be obtained, notwithstanding such claim for damages, and without being subjected to the delay of a litigation respecting such claim.

Again; if we were at liberty to consider this question under the general rules of equity, it would be obvious to remark, it is a novel view of the power and duty of a court of equity, to suggest that when the legislature have said that certain facts shall defeat these summary proceedings, and if they are not established the landlord shall have possession, yet a court of equity may say that certain other facts shall avail as a defence and defeat the statute. For example, if it be conceded that the statute does not permit the tenant in this proceeding to set off against the rent a claim due to himself, a clear legal defence to an action for the rent, but not an extinguishment or payment of the rent, shall a court of equity say that because the legislature have not made that defence, we will? Or what is practically sought of us, although the legislature have in substance, by not allowing, *prohibited* the tenant from setting up any such claim as a ground for retaining the possession, we, a court of equity, will permit it, and the very prohibition in the statute shall be the reason for our doing so. And as already remarked, if such set-off be a defence and the magistrate errs in rejecting it, the remedy of the tenant is by a review of his proceedings.

Still further, if the subject were open for inquiry, upon principle, we should say that the plaintiff has ample remedy without the aid of this court. There is no pretence that the landlord is insolvent. All that the tenant had to do for the preservation of his rights was to pay his rent, and if he had any just claim against his landlord, sue him and recover all that is due. There is nothing new in this. Prior to our recent amalgamation of actions and defences, it was a most common occurrence for a defendant to be sued upon a cause of action to which he had no legal defence, although he had also a cause of action against the plaintiff, which might be of far greater magnitude. Cross actions were necessary. And a familiar example is suggested by the case, similar to that be-

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fore us, when it is recollected that a breach of a covenant to keep in repair, was no defence to an action of debt for rent. And yet, who ever heard of a court of equity interfering in such a case where there was no defence of insolvency, on the ground that if a plaintiff was not enjoined, he might obtain judgment and execution, and collect his claim before the defendant in his cross action could obtain judgment?

In every view of this subject, we think the plaintiff here has mistaken his remedy, he should have paid his rent, and if he have a just claim against the defendant sue and collect it. We have deemed it proper thus to express our views respecting the power of the court in such cases, and the want of any justifiable ground for our interference in the facts stated in the complaint, notwithstanding the present case might, we think, be disposed of on another ground, viz: that the case made by the complaint is fully met by the answer. The whole equity of the bill is denied. All that results from the addition of affidavits to the bill and answer respectively, is that the witnesses differ in their statements, as widely as the parties do themselves, and all idea of irreparable injury is already disposed of. If the plaintiff has chosen to lose the opportunity to pay his rent, that is his own neglect. That and the probable consequent loss of his term, result not from any necessity of the case, not from his being unable to prevent irreparable loss, but from his allowing the time and opportunity to pay his rent, and save his term, to pass by.

I am authorized to say, that the order appealed from, was made in part with a view to save the possession to the tenant until this case could be considered on the appeal, which it was understood would be taken to the general term. And that the justice by whom the order was made, concurs with all the members of the court by whom the argument was heard, in holding that the order must be reversed.

Order reversed, costs on appeal \$10, and on the motion below, to abide the event of the suit.

SUPREME COURT.

EBENEZER HAIGHT agt. ORATOR HOLCOMB.

The attorney has a lien for his costs, on the judgment he has recovered, beyond the power of his client to release. The Code has not done away with this right which existed prior to its enactment. (*This decision upon this point affirms that at special term in the same case, ante, p. 160.*)

But while the attorney's lien should be maintained under, as well as before the Code, it should now, as then, be restricted to what appears as costs on the judgment roll.

It seems, that on a motion by a defendant to set aside an execution on the ground that the judgment is settled, the court has no authority to refer the subject of the amount of costs between the plaintiff and his attorney, without the consent of the plaintiff.

Albany General Term, March, 1858.

Before WRIGHT, GOULD and HOGEBROOM, Justices.

APPEAL from order of special term, as to attorney's lien for services on the judgment obtained by him. (*Reported ante, p. 160.*)

D. K. OLNEY, *for attorney's lien.*

S. A. GIVENS, *for defendant.*

By the court—GOULD, Justice. I am fully of opinion, that the order of the special term is right, in so far as it gives the attorney a lien, (beyond the power of his client to release,) on the judgment he has recovered; the Code not having done away with the right which existed prior to its enactment.

There seems to me, however, a much more serious question involved, when the extent or amount of the lien is to be ascertained. At the special term, it was held, that as the judgment debtor had (before settling with the plaintiff,) notice that the attorney of the plaintiff claimed a lien on the judgment to

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the amount of \$250, for his services in obtaining the judgment, he, the debtor, was bound thereby *to that amount*, and could not so settle with the plaintiff, as to protect himself from paying that sum on the execution, for the benefit of the attorney. At the same time the entire amount of costs contained in the judgment, including \$40 of extra allowance, was \$120.28.

The plaintiff in the judgment on the other hand, claimed that as between him and his attorney, there was nothing due. And to arrive at a decision at the special term, it was necessary to order an interlocutory reference, to ascertain what, as between the plaintiff and his attorney, was due for services in this cause. And it appears that on the reference, the plaintiff refused to appear, denying the authority of the court to refer, without his consent, a controversy between him and his attorney, for the trial of which he had a right to a jury. I am unable to see why this position of the plaintiff is not sound; as the *defendant* (and not the plaintiff,) made the motion to set aside the execution, because the judgment was settled. And if this position be sound, it seems to me to lead us directly to the correct solution of the whole difficulty.

The allowance made by the Code is a substitute for and in strict analogy to the *costs* of the old fee bill; and the amount of such allowance is patent on the judgment, as an item *separate* from the *plaintiff's damages*. To this limit, the attorney has, on the judgment roll itself, *prima facie* claim, of which all parties have legal notice. And in any settlement with the party, the defendant settles those costs *at his peril*. But an agreement as to amount of compensation, made between attorney and client under the Code, is utterly indefinite as well as confined to their own knowledge, and may as well extend to three-quarters of the whole judgment as to any other amount. And should there be a dispute between the attorney and his client, as to what the agreement was, and to what amount it extended, I know of no short remedy to which an attorney is entitled, by which to avoid settling that dispute in the usual way and by the usual tribunals. While, since the tenor and

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extent of this agreement can never appear on the record, no party can ever be safe (in settling a judgment) against a claim of an attorney, however exorbitant or unlikely it may appear, but he must abide the due course of an execution, which will necessarily be collected long before the plaintiff and his attorney can have their differences decided.

It therefore seems to me, that while the attorney's lien should be maintained, under as well as before the Code, it should now, as then, be restricted to what appears as costs on the roll. And I would so modify the order of the special term.

SUPREME COURT.

JOHN FITCH agt. GEORGE W. HALL, JOHN H. WARDWELL and
JOHN A. BARDWELL.

Although individuals may not be *partners* as between *themselves*, yet as to *third persons* they may be liable as such.

The rule is, that a participation in the profits, when such profits are not specifically fixed as a compensation for services, and paid to a subordinate, under the direction and control of principals, renders all such participants liable to third persons as partners.

In this case it appeared that W. & B., two of the defendants, a mercantile firm in Albany, according to some three years' usage and custom, were in the habit of purchasing produce, hay, flour, feed, lumber, &c., on credit, and sending the same to H. the other defendant, residing in Providence, R. I., to sell on joint account; that is, that after the goods sent were sold, and proceeds received, H. remitted to W. & B. the cost of the goods and one-half the profits, taking the other half himself as his compensation, charging no commission. And W. & B. paid the amount due for the goods, and took the other half of the profits, charging H. no commission.

Held, on the purchase and sale of a quantity of hay in pursuance of this custom and usage, where W. & B. had received the cost of the hay from H., but had not paid it over, that H. was liable with W. & B. as a partner, for the price of the hay unpaid.

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New-York General Term, June, 1858.

DAVIES, SUTHERLAND and INGRAHAM, *Justices.*

THIS action was brought by the plaintiff as assignee of A. B. Akin, for the price of a quantity of hay sold by Akin to the defendants. Hall was a merchant and trader, doing business in Providence, R. I., owned vessels, and was wealthy. Wardwell and Bardwell were commission merchants and produce dealers, in Albany, New-York. For three years these two mercantile houses, (the three defendants,) had been and were in the habit of speculating and of purchasing produce, hay, feed, lumber, &c., on credit on joint account. And this hay was purchased in the same way, the purchases made at Albany, the sales in Providence, R. I. The articles so purchased were sent in Hall's vessels to him at Providence; by him sold, the proceeds received, the cost of the articles and one-half of the profits were remitted to Wardwell & Bardwell at Albany. W. & B. paid the amount due for the articles so purchased, and had one-half of the profits, and did not charge Hall any commission. Hall kept the other half of the profits as his share of the profits, charging no commission.

This hay was sold and the proceeds disposed of in the same way. Except the amount for which this action was brought, was not paid over to Akin, as Hall supposed it was.

The testimony as to the purchase of the hay was conflicting. The plaintiff claiming that it was purchased upon the credit of both firms, of all the defendants. The defendant Hall claimed that W. & B. purchased the hay, Hall carried it to Rhode Island, sold it and divided the profits with W. & B. charging no commission. The referee found for the defendant, and held, "that this transaction did not constitute Hall a copartner with W. & B., either as between themselves or as to third persons, and that Hall was not individually or jointly liable with W. & B." for this hay.

Judgment was entered upon the report of the referee, from which the plaintiff appealed.

JOHN FITCH, *attorney and counsel in person.*

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First. The referee erred in holding that Hall was not a *joint purchaser* of the hay.

1. Bedell and Norris show, that in pursuance of an arrangement with the other defendants, Hall went with Wardwell to Akin *for the purpose* of making a joint purchase.

2. Dunn shows that Hall and Wardwell were there together in treaty with Akin about the hay, and Hall criticising its quality.

3. Akin shows that Hall and Wardwell represented themselves as joining in the proposed purchase.

4. Akin on making the sale, *charged* it to the three defendants.

5. Bedell shows that Wardwell and Hall told Bardwell, on their return from Akin's, *that they had bought the hay*.

6. Norris, Dunn and Akin, show, and Hall does not deny, that Akin *delivered* it to Hall's vessel on the deck, and it was shipped in his name to Providence.

7. Hall admits that as he received it on his *sloop* at Albany, so he sold it from his *vessel's deck* at Providence.

8. The negative evidence of *Hall himself*, not only the defendant upon the record, but the *party in interest*, should not on legal principles be permitted to countervail this accumulation of evidence. (*Mechanics and Farmers' Bank agt. Rider*, 5 How. P. R. 401.)

9. A contract is clearly proved between Akin and Wardwell, Bardwell and Hall. The testimony of Akin clearly shows it; the testimony of Bedell, Norris, the admission of Bardwell, conclusively confirm it. Akin swears he said to them, "Well, gentlemen, what do you say—do you conclude to take the hay?" Wardwell said, "Mr. Akin, come over to-morrow, and we will let you know:" (this was after Hall and Wardwell stepped aside and talked together.) Akin did go over, and asked for Hall; Wardwell told him he had gone home, but that, "we have concluded to take your hay." They took the hay. This constituted a contract. Akin offered to sell the hay at 40 cents per hundred; he asked them at his house, if they had concluded to take the hay, (this was after they had examined it, and Wardwell had introduced Hall to

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Akin, as the man who Akin and Wardwell had talked about as the man who wanted to join with Wardwell and Bardwell in the purchase of Akin's hay,) and received for answer, "Come over, and we will let you know." They did let him know—they took it. (6 *Wend.* 103; 14 *Barb.* 354, 341.)

10. Hall ratified the contract of Wardwell, and affirmed the joint purchase, by selling the hay and dividing the profits. (16 *Johnson*, 38; 5 *Hill*, 137; 4 *Selden R.* 411.)

11. By their acts, they mutually bound each other. Hall was bound by the purchase, and Wardwell and Bardwell by the sale. (2 *Kernan*, 443.)

12. This transaction constituted a particular partnership in the transaction, with all the rights and liabilities incident to partnership. (10 *How. Pr. R.* 509.)

13. *Story on Partnerships*, § 89, says: "Slight circumstances will, it seems, be sufficient to satisfy a jury that a person has held himself out to the world as a partner. An action for money had and received was brought for the purpose of trying whether the plaintiff had been a trader within the meaning of the bankrupt laws. At the trial, it appeared that the plaintiff resided under the roof of Greenwood, his brother-in-law, who had long been a trader. Greenwood persuaded the plaintiff to enter into partnership with him. There was a long negotiation between them, and many conversations with creditors were proved, in which the plaintiff sometimes said he had become a partner with Greenwood. There was no evidence of any express agreement, nor of any interference in the business by the plaintiff, except that he had once gone, in company with Greenwood, to a dyer's, and having inquired about some goods that he had with him to be dyed; spoke of them as the joint property of himself and Greenwood. It appeared also, that the partnership, if any, only lasted from the 22d of March till the 9th of May. Upon this evidence, the jury found a verdict for the defendant, thereby establishing that the plaintiff was a partner with Greenwood, and therefore liable to the bankrupt laws; and the court of common pleas held the verdict to be right."

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Second. The referee erred in holding that Hall was not liable as a partner with the other defendants in the purchase.

1. The terms of the partnership as admitted by Hall at the time to Mr. Viele, were, that the other defendants made the purchases, he made the sales, and the three divided the profits.

2. This is entirely distinguishable from the cases of clerks and others, receiving as compensation a *sum equal* to a given share of the profits. It was not contended on the trial of the cause before the referee, that this was a mode of compensating Hall for any services. Hall was the capitalist; Wardwell and Bardwell were poor. (*Hodgman agt. Smith*, 13 *Barbour*, 302; *Smith agt. Wright*, 1 *Abbott's Pr. R.* 243, 245, 247, in court of appeals.)

3. This is one of that class of cases in which parties have sought to take the benefits without the hazards of partnership—but are charged as partners, being entitled to a share of the profits as profits.[1] (*Dob agt. Halsey*, 16 *Johnson*, 31, 40; ✓

[1] *SPENCER, Justice.* "Now it is a very clear proposition, that he who is to take a part of the profits indefinitely, shall, by operation of law, be made liable to losses—upon the principle that by taking part of the profits, he takes from the creditors a part of the fund which is the security for the payment of their debts."

The following list of authorities, both English and American, many of them having been cited by the plaintiff on the argument, have been compiled, and are given as a reference on the question of partnership, for the benefit of the profession: *Grace agt. Smith*, 2 *W. Blackstone*, 998; *Waugh agt. Carver*, 2 *H. Blackstone*, 235; *Hodgman agt. Smith*, 13 *Barbour*, 303; *Smith agt. Wright*, 1 *Abbott's Pr. R.* 243; *Dob agt. Halsey*, 16 *Johnson*, 31, 40; *Cheap agt. Cramond*, 4 *Barnwell & Ald.* 663; *Cushman agt. Bailey*, 1 *Hill*, 526; *Moss agt. The Rossie Lead Mining Co.*, 5 *Hill*, 137; *Fbot agt. Subine*, 19 *John*, 154; *Buller agt. Stocking*, 4 *Seid.* 466; *Maddett agt. White*, 2 *Kernan*, 443; *Levin, Survivor, &c. agt. Stewart et al.*, 10 *Howard P. R.* 509; *Story on Partnership*, § 89; *Reed agt. Hollingshead*, 10 *Eng. Com. Law*, 460; *Brown agt. Cook*, 3 *New-Hampshire*, 64; *Musier agt. Trumpbour*, 5 *Wend.* 274; *Bovill agt. Hammond*, 13 *Eng. Com. Law*, 126; *Bond agt. Pillard*, 3 *Mee. & Welsby*, 357; *Vassars agt. Camps*, 14 *Barbour*, 341; *Lau agt. Ford*, 2 *Paige*, 310; *Adams' Doctrine of Equity*, pages 241, 243; *Story's Equity Jurisprudence*, §§ 672, 673; *Story on Partnership*, 228, 229; *Egberts agt. Wood*, 5 *Paige*, 617, 525; *Hitchcock agt. St. John*, 1 *Hoff. R.* 501; *Martin agt. Van Schaick*, 4 *Paige*, 479; *Wetter agt. Schieper*, 15 *How. P. R.* 268; *Watson on Partnership*, 40; *Post agt. Kimberly*, 9 *Johnson*, 496; *Holmes agt. The United*

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Cheap agt. Cramond, 4 *Barnwell & Ald.* 668, 669; *Waugh agt. Carver*, 2 *H. Blackstone*, 235; *Cushman agt. Bailey*, 1 *Hill*, 526.)

4. Here Hall swore that he sold the "goods on joint account," which brings him within the rule by all cases. (*Reed agt. Hollinshead*, 10 *Eng. Com. Law*, 480; *Brown agt. Cook*, 3 *New-Hampshire*, 64; *Musier agt. Trumpbour*, 5 *Wend.* 274; *Bovill agt. Hammond*, 13 *Eng. Com. Law*, 126.)

5. Hall, by his own testimony, shows that he had a right to control the property; that he exercised the right, and did control the sale of the hay. By law, he could compel an accounting as between Wardwell, Bardwell and himself. This was not disputed on the trial. (*Ogden agt. Astor*, 4 *Sand. Sup. Ct. R.* pages 311, 322 of that case; *Collier on Partnerships*, §§ 25, 45, and notes 3d. *Am. ed.*; and see *Revised Statutes on same subject*.)

6. With respect to third persons, an actual partnership is considered by the law to subsist wherever there is a participation in the profits, even though the participant may have most expressly stipulated against the usual incidents to that transaction. (*Bond agt. Pittard*, 3 *Mee. & W.* 357.)

Ins. Company, 2 *Johnson's Cases*, 331; *Livingston agt. Roosevelt*, 4 *Johnson*, 265; *Cumpton agt. McNair*, 1 *Wend.* 457; *Watson on Partnership*, 74; 6 *Vesey*, 580, 600; *Peacock agt. Peacock*, 2 *Camp.* 45; *Guidon agt. Robson*, 2 *Camp.* 302; *Story on Partnership*, §§ 59, 61, 89; 4 *East*, 144, 147; *Hesketh agt. Blanchard*, 54 *Com. Law*, 640; *Everett agt. Coe*, 5 *Denio*, 180; *Bostwick agt. Champion*, 18 *Wend.* 175; *Green agt. Beesley*, 2 *Bing. N. C.* 108; *Pattison agt. Blanchard*, 6 *Barbour*, 539; *Id.*, 1 *Selden*, 186; *Froment agt. Coupland*, 2 *Bing.* 170; *Chase agt. Barrett*, 4 *Paige*, 148, 159; *Garfield agt. Hatmaker*, *Smith's Court of Appeals Rep. Vol. I*, page 475; *Buckingham agt. Burgess*, 2 *McLean*, 364; *Parker agt. Barker*, 3 *Moore*, 226; *Collier on Partnership*, § 89; *Dezell agt. Odell*, 3 *Hill*, 215; *The Welland Canal Company agt. Hathaway*, 8 *Wend.* 480; *Wright agt. Hooker*, *Selden's Notes*; *Everett agt. Chapman*, 6 *Conn.* 347; *Hoare agt. Dawes*, *Doug. Rep.* 371; *Gouthwaits agt. Duckworth*, 12 *East*, 421; *Pott agt. Eytton*, *T. Term.* 1848, 54 *Eng. Com. Law Rep.* 32; 1 *Smith's Leading Cases*, 726; *Barry agt. Nesham*, 3 *Manning*, *Granger & Scott*, 641; *Ex parte Hamper*, 17 *Ves.* 403; *Ex parte Langdale*, 18 *Ves.* 300; *Ex parte Watson*, 19 *Ves.* 459; *Myres agt. Sharp*, 5 *Taunton*, 74; *Smith agt. Watson & Locke*, 2 *B. & C.* 401; *Chuck*, *Ex parte*, 8 *Bing.* 469; *Leberkam agt. Smith*, 1 *Rep. N. P. Cases*, 29.

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7. That the sharing in the profits and loss, with a right to use the property and an inchoate title to a portion thereof, constituted a full partnership between the parties. (*Vassars agt. Camps*, 14 *Barbour*, 341.)

Third. In any view, Hall is to be deemed a partner, so far as the rights of third persons are concerned. (16 *Johnson*, 34, 40; 1 *Wend.* 463.)

1. This was so held, where the contingent profits of an adventure were to be divided by way of *compensation*, even when it was conceded that there was no partnership *as between the parties*. (*Story on Partnership*, 59, 61, 89; *Hesketh agt. Blanchard*, 4 *East*, 144, 147; 54 *Com. Law*, 640; 18 *Barb.* 302; 18 *Wend.* 185; 1 *Hill*, 526; 1 *Selden*, 191.)

2. So held, where the proprietors of a cotton mill agreed, as a *compensation for money loaned*, to pay the lender a share of the profits to the amount of a penny a yard. (*Everett agt. Coe*, 5 *Denio*, 180.)

3. The rule is stated with precision by the court of appeals: "The error into which the courts below have fallen, is in confounding a community of interest in *the property* out of which the profits are to arise, with a community of interest in *the profits themselves*. The latter is all that has ever been considered necessary to create a partnership *as against third persons*. (*Smith agt. Wright*, 1 *Abbott's Pr. R.* 247.)

4. The chancellor states as the *principle* upon which the rule is founded, "that he who contracts for and relies upon a part of *the profits* of the business as a compensation for his *services*, or for the use of his *capital*, is in natural justice *bound to pay the creditors*, who have, upon the ordinary terms of credit, furnished the merchandise or other means out of which those profits were to arise, or by which they might be increased for his benefit. (*Chase agt. Barrett*, 4 *Paige*, 159; *Grace agt. Smith*, 2 *Blackstone*, 998.)

It is not possible to express in terms more in accordance with the decisions and language of the decisions of the court, in *Waugh agt. Carver*, and in *Smith agt. Wright*, (court of appeals, 1 *Abbott*, 243,) and *Wright agt. Hooker*, (court of appeals,)

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an express agreement to participate in the profits of the hay trade on joint account, and to establish a joint concern between them, than is sworn to by Hall himself at folio 154, where Hall swears he sold the produce on joint account, and took half of the profits.

The rule is settled, that "where a party, either by his act, declaration or conduct, has induced a person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission, if the consequences would be to work an injury to such person or one claiming under him. (3 *Hill*, 216, *Per* BRONSON, J. ; 8 *Wend.* 480.)

The defendant gave the plaintiff's account book in evidence, and produced the plaintiff's account book. He made it presumptive evidence in plaintiff's favor, and is bound by it. The charge was to Wardwell, Bardwell & Co. (15 *Johnson*, 409, 420 ; 5 *Taunt.* 245 ; 3 *Hill*, 74 ; 1 *Cowan & Hill*, 227, 228 and 229.)

Fourth. The defendant held out to the plaintiff, as well by his declarations as his acts, that he was jointly interested—and these facts being undisputed, he should be held jointly liable. Akin believed and supposed he was dealing with Hall, and Hall acted and talked in such a way, that Akin supposed so, and is estopped from denying his purchase of the hay of Akin. (*Buckingham* agt. *Burgess*, 2 *McLean*, 384 ; *Parker* agt. *Barker*, 3 *Moore*, 226 ; *Story on Partnership*, 59, 61, § 64 ; *Col. on P.* § 89 ; 2 *H. Blackstone*, 246, *Lord Ch. J. EYRE* ; 3 *Hill*, 212 ; 8 *Wend.* 480.)

The defendant Wardwell, being a joint contractor, was an incompetent witness for Hall, and especially without the execution or delivery of any release or indemnity ; and as his testimony related only to matters affecting the joint liability of the defendants, the motion to strike it out should have been granted. (*Code*, § 397 ; *Beal* agt. *Finch*, 1 *Kernan*, 183 ; 14 *Barbour*, 841.)

The testimony of John H. Wardwell cannot be received or have any weight in the case. Wardwell says, Hall was not jointly interested in the purchase of Akin's hay. The plaintiff

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admitted that Wardwell would so swear, (see admission in the case.)

The superior court, in 1 *Sandford*, (p. 687,) say that the testimony of a witness, admitted by the opposite party, must be admitted to be as it is given, not that he will swear that the testimony is as it is claimed by the party offering it. Under this rule, Wardwell's testimony cannot be received.

The admissions of one partner are evidence in an action against the firm, although a *nolle prosequi* has been entered against him. *Boyce agt. Watson, J. J. Marsh.* 498; *Cady agt. Sheppard*, 11 *Pickering*, 400; *Odvine agt. Maxcy*, 15 *Mass.* 39; *Fish agt. Copeland*, 1 *Overt.* 383; *Snead agt. Kelly*, 3 *Dana*, 538; *Wood agt. Cornell*, 2 *Wharton*, 548; *Hutchins agt. Childress*, 4 *Stewart Part.* 484.)

In an action against partners, if only one has been served with process, evidence may be given by the plaintiff of the declarations of those not served. (*McCoy agt. Lightner*, 2 *Watts*, 347; *Taylor agt. Hendrickson*, 17 *Serg. & Rawl.* 453.)

The admissions of the defendant, John A. Bardwell, as given in evidence in this case, is conclusive and is binding, and binds the defendant Hall. The above authorities clearly sustain it.

HENRY G. WHEATON, *counsel for defendant Hall.*

First. A full statement of the case is contained in the opinion of the referee, commencing at folio 170, by which it appears that the only question in the case was, whether the defendant Hall, who alone defended the suit, was jointly concerned with the other defendants in the purchase of a quantity of hay, for the price of which, the suit was brought.

The referee decides, as a question of fact, that the sale was not made to the defendant, but was made to the defendants Wardwell and Bardwell, who were partners in business, in Albany.

The referee also decides, as a question of law, that the facts proved, did not constitute the defendants partners in the purchase of the hay, so as to make the defendant Hall, liable for

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the purchase money. (*Vanderburgh* agt. *Hull*, 20 *Wend.* 70; *Denny* agt. *Culbat*, 6 *Met.* 82; *Loomus* agt. *Marshall*, 12 *Conn.* 69; *Champeau* agt. *Bostwick*, 18 *Wend.* 175, 184 and 185; *Burkle* agt. *Hart*, 1 *Denio*, 337; *Murphy* agt. *Whitney*, 10 *John. Rep.* 226.)

The defendants Wardwell and Bardwell were partners doing business in the city of Albany, in the purchase and sale of produce. The defendant Hall, lived in Providence, Rhode Island, and as appears, was a commission merchant there. (See testimony of *Akin*, folio 28, and *Hall*, folio 156.)

Second. There is no pretence that Hall had anything to do personally with the purchase of the hay; the whole question is, whether the facts clearly found make him liable as a partner of Wardwell & Bardwell in the purchase of the hay? The only facts proved, bearing upon that question, are that Wardwell & Bardwell purchased the hay, and sent it to Hall at his place of business in Providence, to be sold, and to compensate him for his services, he was to have a portion of the profits arising from the adventure.

Hall was a mere agent to sell, and had no interest in the hay till the sale was made, and then his interest accrued in the proceeds of the sale.

Hall swears positively he had no interest in the purchase.

Third. The testimony of Wardwell was properly admitted.

1. The testimony he gave was against his interest, it being for his interest to have Hall bound to pay his part of the debt. His testimony went merely to discharge Hall, leaving himself bound for the debt. (*Beal* agt. *Finch*, 1 *Kernan*, 128; *Lefever* agt. *Brigham*, 10 *How.* 385; 9 *How.* 390.)

By the court—DAVIES, Justice. The plaintiff in this action seeks to charge the defendant Hall, as partner with defendants Wardwell & Bardwell, in a sale of hay, made by one *Akin*, and whose claim has been assigned to plaintiff.

The referee has found as a question of fact, that the purchase originally was made by the defendants Wardwell &

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Bardwell, and that Hall was not a party to this purchase, although there is some evidence authorizing a different conclusion; there is, we think, evidence sufficient to sustain the finding of the referee on this point. We do not think it necessary, therefore, to interfere with the conclusion on this question, to which he has arrived.

The question of law submitted for our consideration, we think, was clearly and well stated, by the counsel for the defendant Hall, and is, did Hall, under the arrangement to sell the hay on joint account and divide the profits with Wardwell & Bardwell, constitute himself a partner so far as the plaintiff or his assignee is concerned?

It is quite true, as between the defendants themselves, they were not partners. But it has long been settled, that although they might not be partners as between themselves, yet as to third persons, they might be liable as such. The rule is, that a participation in the profits, when such profits are not specifically fixed as a compensation for services, and paid to a subordinate, under the direction and control of principals, renders all such participants liable to third persons as partners. The case of *Waugh agt. Carver*, (2 H. Black. 285,) decided on the authority of *Grace agt. Smith*, (2 W. Black. 998,) fully sustains this position.

By an agreement entered into between the defendants, Carver and Carver & Geisler, it was arranged between them, that they should respectively share in the profits of each other's business, in certain proportions, and it was also provided, that each should bear his own losses, and not be responsible for the defaults and losses of the other. The counsel for the plaintiff in that case, cited several authorities, which certainly sustain the position that a participation of profits is sufficient to constitute a partnership.

Chief Justice EYRE, in delivering the opinion of the court, says that it is plain upon the construction of the agreement, if it be construed only between the Carvers and Geisler, that they were not and never meant to be partners. They meant each house to carry on trade without risk of each other, and to be

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at their own losses. And on the authority of *Grace agt. Smith*, (*supra*), he holds that he who takes a moiety of all the profits, shall by operation of law be made liable to losses, if losses arise, upon the principle that by taking part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts; and he adds: "for though with respect to each other, these persons were not to be considered as partners, yet they have made themselves such with regard to their transactions with the rest of the world."

The superior court in *Smith agt. Wright*, (5 Sand. 113,) held in a case where two mercantile firms agree to share profits and loss upon contracts for the purchase or sale of merchandise, to be made by each firm in its own name, and to be executed with its separate funds, they are not liable as copartners either as between themselves or to third persons. In that case, the arrangement between the parties was very like that, as testified to by defendant Hall, existed between him and defendants Wardwell and Bardwell. But the court of appeals reversed that judgment and held that the defendants though as between themselves were not copartners, the arrangement made between them to share the profits, constitutes them partners as to third persons. (1 *Abbott's Pr. Rep.* 243.)

EDWARDS Justice, in delivering the opinion of the court, says, "all interest which is necessary to constitute a partnership, is an interest in the profits, and such an interest necessarily constitutes a partnership, unless, as has been stated, the interest in the profits is given as a compensation for services." The learned judge refers with approbation to the case of *Everett agt. Chapman*, (6 Conn. Rep. 347,) where the parties had agreed that each one should purchase hides on his own credit, and should manufacture and sell the portion so manufactured by him, each party to participate in the profits. It was held that all the parties were liable as copartners to a third person, who sold hides to one of the parties in ignorance of the partnership, and charged the same to him.

The reasoning of the learned Judge DAGGETT, in the case

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last cited, and the authorities cited by him, seem to me conclusively to dispose of this case.

The judgment entered on the report of the referee must be reversed, and a new trial ordered, with costs to abide the event, and the case may be referred to a referee residing in the city of New-York.

SUPREME COURT.

JOHN FAIRBANKS agt. PATRICK TREGENT, JR., impleaded, &c.

The provision in § 399 of the Code is general; it permits the examination of a party the same as any other witness. This necessity places him in the same position as any other person to be examined in reference to time, manner and in every other respect.

Therefore, *held*, that a non-resident defendant might, on his own application, have a commission for the examination of himself and other non-residents on his own behalf.

Kings Special Term, April, 1858.

THE defendant was a resident of the state of Michigan, and an application was made by him for the examination of himself and other non-residents of this state, on his own behalf. No notice of the intended examination of the plaintiff at the trial had been given, and it was insisted by him, that under such circumstances a commission could not issue for the examination of the defendant on his own behalf.

WM. TRACY, *for plaintiff.*

L. K. MILLER, *for defendant.*

LOTT, Justice. It is provided by section 399 of the Code, as amended in 1857, that a party to an action or proceeding, may be examined as a witness in his own behalf, the same as any other witness, on previous notice, except in certain cases; the defendant is a resident of Michigan, and it is conceded that

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this is a case in which he can be examined on the trial. The provision is general, it permits the examination of a party *the same* as any other witness. This necessarily, in my opinion, places him in the same position as any other person, to be examined, in reference to time, manner and in every other respect, and consequently authorizes him to be examined conditionally or under a commission, as well as on the trial. There is certainly nothing in its terms restricting such examination to the *trial*, and I cannot discover any reason in the spirit or policy of the act which requires such a construction. It is true that there is a subsequent provision in the same section which declares that when a notice of such intended examination of a party is given in an action in which the opposite party shall reside out of the jurisdiction of the court, such party may be examined by commission, issued and executed as now provided by law. That is entirely disconnected with the portion of the section first quoted, and while it may be difficult to discover the necessity of this last provision, yet that does not warrant a construction of a clause general in its terms, so as to limit it to a certain class of cases only. I think, however, that the provisions are not necessarily inconsistent. As a general rule, a party can only be examined on a previous notice given by himself of such intended examination; but whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received. As, however, a party residing out of the jurisdiction of the court, may not be able to be personally present to avail himself of that right, the privilege of taking his examination under a commission is given to him on receiving a notice of the intended examination of his adversary, without demanding a compliance with the requisitions of law necessary to authorize the examination of other persons in such manner.

After a full examination of the question, which was ably discussed by counsel, I have concluded that the commission must be awarded directing the examination of the defendant, as well as the other persons named in the notice of motion.

SUPREME COURT.

J. D. DUDLEY and others agt. J. Z. GOODRICH and others.

Where an undertaking was given on discharging an attachment against a non-resident defendant; and subsequently the plaintiff moved for other sureties, on the ground that one of them was insolvent,

Held, that the court had no power to order additional sureties in such a case.

At Chambers, New-York, July, 1858.

THE plaintiffs are merchants of this city, and the defendants large manufacturers in Massachusetts. To satisfy an alleged claim, the plaintiffs attached property of the defendants, which was released upon filing the usual undertaking. Subsequently the defendants' sureties became insolvent, whereupon the plaintiffs moved that new security be given.

WOODBURY & CHURCHILL, *for plaintiffs*, argued the following points :

I. The court may require the defendants to give new sureties, on the fact being made to appear that either one or both of the defendants' sureties has become insolvent. (*Willett agt. Stringer*, 15 *How. Pr. R.* 310; *Bridges agt. Canfield*, 2 *Edw. Ch. R.* 208.)

The Hartford Quarry Co. agt. Pendleton, (4 *Abb.* 460,) is not in point. The plaintiffs there, being a foreign corporation, were obliged to file security for costs, in order to acquire the right to maintain the action. Having done so, it was properly held that they could not lose their status in court, for the reason that their sureties had become insolvent. *Bridges agt. Canfield*, was an ordinary case where security for costs had been given, and the plaintiffs were required to give new sureties, the former sureties having become insolvent.

II. The insolvency of either surety is sufficient to enable the plaintiffs to succeed on the motion. Here both are virtually insolvent. The true test whether or not a new surety should be required, is, could the surety to whom objection is now

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made, justify as such if now offered for the first time? The plaintiffs have a right to be placed in the position which they occupied when the action was commenced, and this continues down to the entry of judgment.

III. There are no laches on the part of the plaintiffs. It does not appear that the plaintiffs knew of the insolvency until very recently. The laches of plaintiffs, if any exist, work no injury to defendants. The progress of the action is not affected in any way.

IV. The responsibility of defendants is no answer to the motion. They are non-residents, show no property within this state, and the plaintiffs in the event of success in the action, would be compelled to collect their judgment by an action thereon in another state, and through a foreign tribunal. The court will not put them to this trouble.

W. J. A. FULLER, *for defendants*, argued on these points:

I. There is no provision made by statute or by rule of court, to compel the defendants to substitute new sureties where the first have become insolvent; and the court has not the power to make such an order independent of statutes. (*The Hartford Quarry Co. agt. Pendleton*, 4 Abbott, 460.) That case is analogous to the present one. There a foreign corporation obtained the right to sue by filing the proper undertaking, and that right was not affected by the subsequent insolvency of the sureties. Here the defendants obtained a release of the attachment against the property of non-residents by filing the proper undertaking, and by a parity of reasoning, they too, can be in no way affected by the subsequent insolvency of the sureties. The cases cited by the plaintiff's counsel are not at all in point, except that *Willett agt. Stringer*, (15 How. 310,) establishes the principle that when upon an appeal an undertaking is perfected, the appellant does not remain responsible for the insolvency of his sureties; and so far it sustains the theory of the defendants in this action.

II. The question here raised is new and important, never having been judicially determined, and should be decided upon

first principles. The original object of an attachment against the property of a non-resident debtor, was merely to secure the appearance of the party, that the court might obtain jurisdiction, and was not to secure the alleged debt. It is true that the design of the Code was to secure the debt as well as to obtain jurisdiction, probably upon the presumption that a resident judgment debtor would be here to answer with his property, and it does not provide for the release of the property attached upon appearance in the action, except upon giving an undertaking; but in other states, everywhere where the common rule obtains, as soon as there is an appearance, there is an end of the attachment. The Code thus gives advantage enough to resident suitors, without calling upon the court for further aid in a proceeding like this, for which there is no law, no rule, no warrant, no reason, no precedent.

III. If the preceding positions be untenable, and the court should hold that it has the power to order new security, it then becomes a question of judicial discretion in each instance, and the facts of this case are such that the motion, on its own merits, should be denied. [This proposition was argued at length, but is omitted here, as the question was not decided upon its merits, but upon the abstract principle of law involved.]

INGRAHAM, Justice. The undertaking in this case was given on discharging an attachment against a non-resident defendant. The plaintiff moves for other sureties, on the ground that one of them is insolvent.

It appears to me that this is one of those cases in which the court has no power to order additional sureties. The property has been discharged from the attachment in the mode pointed out by statute. There is no power to issue another attachment, and the court has no control over the property attached.

The reasons stated by me in *The Hartford Quarry Co. agt. Pendleton*, (4 Abbott, 460,) are applicable to this case.

The same reasons are stated by Mr. Justice HOFFMAN, in *Willett agt. Stringer*, (15 How. 310,) as to undertaking on appeals.

Motion denied, defendants' costs to abide event.

SUPREME COURT.

ST. JOHN agt. HART.

Where the plaintiff moved for leave to *discontinue* without costs, the defendant having put in an answer setting up the defence of infancy, *held*, that the motion should have been made as soon as the plaintiff was aware of the defence. Having proceeded and made costs after that, he must pay them.

New-York Special Term, July, 1858.

MOTION by plaintiff for leave to discontinue the action with out costs.

F. TILLOU, *attorney for plaintiff.*

H. P. TOWNSEND, *attorney for defendant.*

INGRAHAM, Justice. The plaintiff should have made this motion as soon as he was aware of the defence of infancy. Since the answer was put in he has continued to proceed with the cause, and has materially increased the costs. There is no excuse for this, and he can only be relieved on payment of them.

Motion for leave to discontinue is granted on payment of the costs after the answer was put in.

No costs allowed on this motion.

SUPREME COURT.

WILLIAM RUSSELL agt. ROSWELL S. MEACHAM.

"When the answer of the defendant, *expressly or by not denying*, admits part of the plaintiff's claim to be just, the court on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy." (Code § 244, last clause of sub. 5. *The amendment in 1857 of this clause consists in the words in italic.*)

It seems, that previous to the amendment of this paragraph in 1857, its provisions had no application to an ordinary action upon contract. The legislature could not have intended to restore, or even authorize imprisonment for the non-payment of a demand, in cases where such imprisonment would have been unauthorized before; or in any way to repeal, limit or qualify the effect of the act which abolishes imprisonment for debt. (*See Lane agt. Losee*, 11 How. 360.)

But now the court may make an order in the nature of a judgment, and enforce it by execution, or in a proper case, where defendant might be imprisoned on final judgment, may enforce obedience to the order by attachment.

Therefore, *held*, where three distinct causes of action on contract, by three separate counts, were embraced in the plaintiff's claim, and one of them was undefended, not denied, that the plaintiff might have an order to enforce payment of the undisputed demand before the issues upon the other demands were tried.

It seems, that where the plaintiff's claim is founded on a single cause of action, the court will not split up the demand by ordering payment of part before judgment.

Albany Special Term, January, 1858.

MOTION that defendant be required to pay money admitted to be due.

The complaint contained *three* counts. The *first* count stated that the defendant had hired of the plaintiff a certain store in the city of Albany, for which he agreed to pay a stipulated rent, together with the taxes which should be assessed thereon, and that the defendant had failed to pay such taxes, amounting to \$177.84.

The *second* count alleged a subsequent letting of the same premises for another year, commencing on the first day of May, 1857, and that there was due for rent in arrear on the

first day of November, 1857, the sum of \$295, which sum, with the interest thereon, still remained unpaid.

The *third* count set forth a note against the defendant and claimed a balance due thereon to the plaintiff.

The defendant put in an answer, in which he denied the allegations in the *first* and *third* counts, but did not controvert any material allegation in the second count.

The plaintiff thereupon moved for an order requiring the defendant to pay the amount of rent as claimed in the *second* count of the complaint with the interest thereon, and the costs of the action, or for judgment for that amount.

S. F. HIGGINS, *for plaintiff.*

H. HARRIS, *for defendant.*

HARRIS, Justice. But for the amendment to the last clause of the 5th subdivision of the 244th section of the Code, adopted in 1857, I should have been inclined to hold with Mr. Justice CLERKE, in *Lane agt. Losee*, (11 How. 360,) that the provisions of that paragraph had no application to an ordinary action upon contract. I cannot suppose that the legislature intended by such an enactment to restore, or even authorize imprisonment for the non-payment of a demand, in cases where such imprisonment would have been unauthorized before. The provision in question should be so construed as not to repeal or in any way limit or qualify the effect of the act which abolishes imprisonment for debt. Whether or not the order contemplated by this provision shall be made, is, in all cases, a question addressed to the discretion of the court, and in my judgment such an order should never be granted, when its effect might be to imprison the defendant, where he would not have been liable to imprisonment upon a judgment recovered for the same demand.

But the paragraph as now amended, seems to be relieved of this difficulty. The court may now make an order in the nature of a judgment and enforce it by execution, or in a proper case, may enforce obedience to the order by attachment. The

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latter remedy is only appropriate where the defendant, upon a final judgment in the same action, would be liable to imprisonment.

In the case now before me, three distinct causes of action are embraced in the plaintiff's claim. One of these is undefended. I can see no more objection in principle against permitting the plaintiff to enforce payment of this undisputed demand before the issues upon the other demands embraced in the complaint are tried, than there would have been if separate actions had been brought for the several demands. Were the plaintiff's claim founded on a single cause of action, I should not in any ordinary case, feel inclined to *split up* the demand by ordering payment of a part before judgment. I do not think the provision in question was intended to apply to such cases.

In this case, an order may be entered requiring the defendant to pay the sums specified in the *second* count of the complaint, with the interest thereon, and that such payment be enforced by execution against the property of the defendant.

The plaintiff has also applied for leave to collect the costs of the action, in addition to the amount admitted to be due, but such costs are only allowed upon the recovery of final judgment. Nor is this a proper case for charging the defendant with the cost of the motion.

SUPREME COURT.

JOHN DUNDERDALE and EMILY, his wife agt. SUSETTE
GRYMES.

Where two actions were brought by husband and wife, one on contract upon an agreement with the wife to pay for board in a boarding-house kept by her, and claiming that the amount due the wife was her separate property; the other an action of trespass, alleging that the defendant "broke and entered a certain

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close, in the possession of and occupied by the said " wife; and also " broke and entered the dwelling-house occupied by the said " wife, "and forced open the doors, whereby the said ' wife' was hindered and prevented," &c;

Held, that there could be no doubt upon the facts stated in the complaint in the first case, but that the husband was the owner of the demand and entitled to the recovery. And in the other case, there being no allegation that the lands belonged to the wife, still less her separate estate, the injury in view of the law was to the husband's rights, and the damages to be recovered belonged to him. The next question was, whether husband and wife could sue together to recover debts due him, or damages incurred by or inflicted on him? *Held*, a misjoinder and the objection may be taken by *demurrer*, because the relation existing between husband and wife, is not the same as that which exists between two ordinary co-plaintiffs; they are incapable of several judgments at the trial!

Richmond Special Term, May, 1858. Two Cases.

DEMURRER to complaint.

The first of these cases was on contract, and the other was a trespass suit. The defendants demurred to the complaint in each case, on the ground of misjoinder of plaintiffs, and that the complaint did not show a cause of action, and in the trespass case, the additional ground that several causes of action were improperly united. The demurrers were argued together.

The complaint in the contract case is as follows :

" The complaint of the plaintiffs shows to this court, that the plaintiff John Dunderdale is the husband of the said Emily Dunderdale; that the said Emily Dunderdale was the keeper of a boarding-house in the town of Castleton, in the county of Richmond, in the year 1856; that on or about the first day of May, in said year, the defendant hired and took board and rooms with the said Emily Dunderdale, for herself and servants, and used and occupied the stable belonging to said Emily Dunderdale, and continued to receive such board and to use and occupy said rooms and stable, from said first day of May, until on or about the 17th day of November, 1856, for which she then and there agreed to pay said Emily Dunderdale, what such board, and the use and occupation of such rooms and stable were reasonably worth; that the same were reasonably worth the sum of \$865.50, for the period aforesaid; and al-

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though requested so to do, the defendant has not paid the same or any part thereof, except the sum of \$18; that the amount so due the said Emily Dunderdale is her separate property. Wherefore, the plaintiffs demand judgment against the defendant for the balance of \$847.50, with interest from November 17th, 1856."

In the trespass case, the complaint contained two counts:

In the first count, after alleging the relationship of husband and wife, between the plaintiffs, the complaint stated that the defendant "broke and entered a certain close, *in the possession of and occupied by the said Emily Dunderdale, lying,*" &c., "and then and there dug down a certain stone wall," and also "broke and entered the dwelling-house *occupied by the said Emily Dunderdale*, and forced open the doors, whereby the said *Emily Dunderdale* was hindered and prevented from having the use and enjoyment of the said close and dwelling-house, and her furniture and household articles were greatly damaged, &c."

The allegations of the second count were the same as the first, except that the trespass alleged was, that the defendant "ejected, expelled, put out and amoved the said *Emily Dunderdale* and *her* family from the possession of the said close and dwelling-house."

LOTT C. CLARK, *for plaintiffs.*

WM. I. STREET, *for defendants.*

EMOTT, Justice. It is not necessary in these cases to determine whether as the Code stood before the revision of 1857, it was ever allowable to join the husband as a co-plaintiff with the wife in an action relating to her separate property, or whether the objection to such misjoinder could be taken by demurrer. There is great force in the views expressed by Judge HARRIS, on both these points, in *Bronson agt. Gifford*, (8 *How. P. R.* 395.) But these cases are both suits upon demands or causes of action which belong to the husband. In one case, the suit is brought upon an agreement with the wife to pay for board in a boarding-house kept by her. Notwith-

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standing the allegation that this claim is her separate property, I suppose there can be no doubt upon the facts stated in the complaint, that the husband is the owner of the demand, and entitled to the recovery. The other suit is for a trespass committed by intruding into lands of which the wife was in occupation, and by ejecting her. There is no allegation that these lands were hers, still less, that they were her separate estate. The injury in the view of the law, was to the husband's rights, and the damages to be recovered belong to him.

The question then is, whether husband and wife can sue together to recover debts due him or damages incurred by or inflicted on him? There can be but one answer to this question, and I cannot doubt that this answer can be given on a demurrer. There are cases which hold that where one of several plaintiffs appears to have no interest in a cause of action upon which the others may properly maintain the suit without him, the Code does not permit a demurrer for the misjoinder. But husband and wife cannot be regarded or treated as two several plaintiffs. When a suit is brought by them together, the relation between them is not the same as that which exists between two ordinary co-plaintiffs. The best, if not the only sufficient reason for the decisions I have just referred to, is that to sustain such demurrers would nullify the provisions of the Code, authorizing the court at the trial to give such judgment among various parties, for some and against others, as substantial justice requires. This is a beneficial provision, enabling us to dispose of such difficulties more satisfactorily in the end, than if we drove that portion of the plaintiffs who were rightfully before us out of court, because they were accompanied by others who did not belong there. When the cause is tried, we can render a judgment in favor of the former, and another against the latter. And thus, while no injustice is done, nor any delay of justice occasioned, no legal principle is violated. But such a remedy cannot be applied in cases where husband and wife are the plaintiffs. It is not easy to see how a judgment could be given in favor of the husband and against the wife, in such cases as the present. At all events such a judg-

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ment would be of no avail to indemnify a defendant for the costs of a suit improperly brought, and, therefore, justly defended. These suits must either be sustained altogether, or amended as to their entire frame, or dismissed altogether. And if the objections presented by the demurrers must at the trial be fatal to the suits, because from their nature they are incapable of several judgments, it is no hardship to the plaintiffs to sustain a demurrer.

There must be judgment for the defendant in both cases, with leave to amend on the usual terms.

SUPREME COURT.

The People *ex rel.* MACTAGGART agt. GALE, Clerk of the Marine Court.

On an application for a *mandamus* to compel the clerk of the marine court to issue an execution on a judgment of reversal by the general term, of a judgment of the special term of that court, on the ground that all the proceedings founded on the appeal to the general term were void, and that the judgment of the special term remained in full force, for the reason among others of less importance, that the time allowed by statute for bringing the appeal had expired,

Held, 1st. That the question on the motion to dismiss the appeal decided by the general term of the marine court, was one concerning the regularity or validity of proceedings within its own especial cognizance; and with regard to which, it is proper that its decisions should generally be deemed conclusive. If, indeed, the time allowed by statute for appealing had expired, the court had no power to extend it; but they were the best judges of the fact, whether the time had expired, and whether all the other proceedings in relation to it were regular.

2d. Even if the proceedings relative to the appeal had been a nullity, the counsel for the relator, after unsuccessfully moving to dismiss the appeal on the ground of irregularity and nullity, argued the meritorious points involved in the case on the appeal before the general term. This was a complete *waiver* of all defects relating to the *manner* of the appeal, although before the argument on the merits, they might have amounted to a nullity.

Provided the action is legitimately within the jurisdiction of the court, a party cannot appear to urge objections on the merits, seeking to avail himself of a deci-

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sion in his favor, and at the same time reserve a right if it should be against him, to assail the form in which the essential subjects in dispute have been presented.

And 3d. It is very doubtful whether it would be a proper exercise of the discretionary power of this court on an application for a *mandamus*, to grant it on an occasion merely concerning the practical proceedings in another, though inferior court of judicature.

New-York Special Term, June, 1858.

APPLICATION for *mandamus* to the clerk of the marine court.

W. B. WEDGWOOD, *attorney for relator.*

CLERKE, Justice. The opinions which I intimated on the argument of this motion, have been confirmed on careful examination and deliberation. In the action in which it is claimed by the relator that this court should by *mandamus* compel the clerk of the marine court to issue an execution, an appeal was taken by the defendant in that action, to the general term of that court. A motion was made before the special term of the said court by the plaintiff, to dismiss the appeal on various grounds of irregularity, of which the principal was, that the time for appealing had elapsed before the appeal was taken. The motion was granted, but was afterwards reversed by the general term. The appeal then proceeded on its merits, and the judgment of the special term in favor of the plaintiff, was reversed by the general term.

The relator, who was the plaintiff in that action, asks this court for a *mandamus*, to compel the clerk of the marine court to issue an execution, notwithstanding the reversal, on the ground that all the proceedings founded on the appeal were void, and that the judgment of the special term remains in full force. The question on the motion to dismiss the appeal, decided by the general term, was one concerning the regularity or validity of proceedings within its own especial cognizance; and with regard to which, it is proper that its decisions should generally be deemed conclusive. If, indeed, the time allowed

by the statute for appealing from the special to the general term has expired, the court have no power to extend it; but they are the best judges of the fact whether the time has expired, and whether all the other proceedings in relation to it are regular. And, however erroneous we may suppose their decision on this point to be, however inconsistent with the fact we may suppose it to be, it cannot be said, that all their subsequent action predicated on this decision is absolutely void, as if it was *coram non judice*; and on no other ground could we grant a *mandamus* to the clerk to issue execution on the judgment of the special term. This is not analogous to a case where they may undertake to exercise power in relation to subjects or persons, over which or over whom they had no jurisdiction whatever; as if they issued an injunction, or attempted to compel the specific performance of a contract, or as if they undertook to exercise that general control and superintendence over public bodies, officers, and all other courts of original jurisdiction, which belongs to this court alone, by issuing for example, a *mandamus*, such as the relator demands on the present application. Then, certainly, every proceeding founded on such an usurpation of power, would be totally and irreparably void. But the action in which the proceedings occurred complained of by the relator, was confessedly within the cognizance of the marine court. They had legal possession of the subject, and jurisdictional control over the persons of the litigants; and they alone had a right to pass upon the regularity of the proceedings in that action, except so far as those proceedings may be liable to review *by the ordinary methods of appeal to a higher court*.

Again; even if the proceedings relative to the appeal had been a nullity, and even if it did not belong to the inherent and essential powers of the court to pronounce whether they were regular or irregular, whether they were amendable or not amendable, or whether they did or did not constitute a nullity, yet I perceive, that the counsel for the relator, after unsuccessfully moving to dismiss the appeal on the ground of irregularity and nullity, argued the meritorious points involved in

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the case, on the appeal before the general term of the court. This, I consider a complete waiver of all defects relating to the *manner* of the appeal, although before the argument on the merits, they might have amounted to a nullity. Provided the action is legitimately within the jurisdiction, a party cannot appear to urge objections on the merits, seeking to avail himself of a decision in his favor, and at the same time reserve a right, if it should be against him, to assail the form in which the essential subjects in dispute have been presented. This would scarcely be deemed fair at any kind of game, whatever may be the nature or value of the stake. Doubtless, mere nullities, in general, cannot be waived by implication, and may be taken advantage of, notwithstanding an inconsistent step by the party objecting. But this is far from being universal. Like all other general rules, particularly in legal science, it must be understood with qualifications. A nullity in an early stage of a cause or proceeding, may be inferentially waived, when it is only a formal defect, as in the case referred to by *Chitty* in his *Practice*: "If a defendant plead in bar, and there has been a regular trial and verdict, it is not to be supposed that the latter, or the judgment and execution thereon, would be afterwards set aside, on the ground that there was no summons, or no formal appearance for the defendant entered." So, also, if the time for appealing elapsed, although the court have no power to extend the time, and although the respondent does not waive his objection by merely moving to dismiss the appeal, yet if he appears and argues the case on its merits, he cannot afterwards take advantage of the defect, however fatal it might have been, if he had declined to appear at the hearing.

I repeat, therefore, what I intimated on the argument of this motion, that it is not within my province on this occasion, to review the proceedings which constitute the alleged defects in this case. The court which had jurisdiction of the action, was the proper place in which to decide whether they were regular or irregular, void or not void; and even if its power on this subject were questionable, the relator by appearing on

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the argument of the appeal, waived all objections to the manner in which it was brought before the appellate authority.

And even if this were not so, it is very doubtful whether it would be a proper exercise of the discretionary power of this court on an application for this high prerogative writ, to grant it on an occasion merely concerning the practical proceedings in another, though inferior court of judicature; which I think it expedient for several reasons, should have complete control over its own practice, in all instances not compromising the interests of substantial justice. This writ, undoubtedly, is of a most extensive remedial nature; but policy, convenience and justice, alike dictate that we should be cautious in awarding it.

Motion denied, with \$10 costs.

SUPREME COURT.

WILLIAM BRIDENBECKER, President of Frankfort Bank agt.
DANIEL MASON, HENRY C. JOHNSON and PETER J. HOTALING.

THE MOHAWK VALLEY BANK agt. THE SAME.

When a judgment is fraudulent or is invalid by reason of some substantial defect, it will be set aside on the application of *any* party interested in impeaching it. The *offer of judgment* under § 385 of the Code, is not confined to actions upon contract, nor is the privilege confined to actions against a sole defendant, but extends to actions against several. Whether all who have been served with process, should not join in the offer unless the plaintiff is entitled to judgment by default against those not uniting in the offer, is questionable. The offer should be such, and made at such a time, that the plaintiff may at once avail himself of it, and take his judgment.

"The defendant," in the section means a sole defendant, or all the defendants who have been served with process, who really make but one "party" to the action.

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One copartner, where all are served with process, has no authority to confess judgment for his co-defendants. The implied agency resulting from the relation of the parties does not extend to an act like that. He can only bind himself.

In this case, the actions were upon demands arising upon contract against the firm of "D. Mason & Co.," the defendants constituting that firm, at the time the contracts were made. One action was commenced by the service of a summons, and the other by service of a summons and complaint upon all the defendants personally, on the same day. And on the same day, Mason, without the knowledge of his co-defendants, served upon the attorneys of the respective plaintiffs an offer of judgment under § 385 of the Code, signed "D. Mason & Co.," and "D. Mason." Upon such offer, the judgments were perfected the same day against all the defendants.

Held, that the judgments were entered without authority as against Johnson & Hotaling, the co-defendants of Mason. 1st. Because there was no authority to Mason to make and sign the offer as a *special agent* of the other defendants. To authorize such an offer, some proofs of authority should accompany the act, and make a part of the proceedings and record in the case. And a *special attorney* must also be approved and ratified by the court, before he can act as an attorney in the conduct and management of a cause.

2d. The offer does not purport to be signed by Johnson & Hotaling, or in their behalf. The signature "D. Mason & Co.," does not authorize judgment against them. The addition of "& Co.," to the name of D. Mason, is no authority to the clerk of the court to enter judgment against any one.

3d. The judgments were not good even against Mason, for the reason that the papers filed showed service on the other defendants, and that the time for them to answer had not expired.

It seems, that had Mason employed an attorney to appear for all the defendants, and he had served the offer as such attorney without fraud or collusion, the judgments would have been technically regular, and would probably have been sustained.

MOTION on behalf of the Bank of Central New-York, a judgment creditor of the defendants, to set aside the judgments in the above actions, and for such other relief as the moving party may be entitled to. The judgment in favor of the Bank of Central New-York, was perfected on the 6th of February, 1858, against all the defendants, upon confession of judgment by all. The judgments in the above actions were perfected on the 22d day of January, 1858, on which day they were commenced, the one by the service of a summons, and the other by service of a summons and complaint, upon all the defendants personally. The actions were upon demands arising upon contract against the firm of "D. Mason & Co.," the de-

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defendants constituting that firm at the time the contracts were made. On the same day, Mason, without the knowledge of his co-defendants, served upon the attorneys of the respective plaintiffs, an offer of judgment under § 385 of the Code, signed "D. Mason & Co.," and "D. Mason." Upon such offer, the judgment was perfected against all the defendants.

GEO. W. SMITH, *for motion.*

GEO. A. HARDIN, *opposed.*

W. F. ALLEN, Justice. The contest is between creditors of the late firm of D. Mason & Co., for priority in the collection of the debts, and in this "race of legal diligence," the parties must stand upon the legal rights which they have acquired by their vigilance. A mere irregularity in the prior judgments will not be available to the junior judgment debtor upon this motion. A want of conformity to some rule of practice, which does not go to the foundation of the judgments or the jurisdiction of the court, may be waived by the parties to the proceeding, and will be considered as waived if not seasonably objected to by them.

Third persons cannot take the objection that the judgment or proceeding is irregular. (2 *Chitty Arch.* 1376.) But when a judgment is fraudulent or is invalid by reason of some substantial defect, it will be set aside on the application of any party interested in impeaching it. (*Martin* agt. *Martin*, 3 *B. & Ad.* 934; *Hand* agt. *Barton*, 3 *B. & C.* 202; *Chappel* agt. *Chappel*, 2 *Ker.* 215.)

The judgments complained of, were entered under the authority of the 385th section of the Code. This section has in practice been greatly perverted from its true and proper purpose, and made to supply the place of a confession of judgment without action, and in a way to dispense with the safeguard and securities against fraud which are thrown around the latter method of obtaining a judgment for an acknowledged demand.

In the confession of judgment under the Code, the public

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have some security in the oath of the party that the consideration is fair and honest, and the amount really due or to become due to the creditor, or that it is honestly given to secure against a contingent liability. It was not the design of the legislature to provide a way by which the public should be deprived of this security. The purpose and object of § 385 and succeeding sections, are clearly indicated by the title of the chapter, as well as by the report of the commissioners by whom it was reported to the legislature. The Code requires that in actions arising upon contract for the recovery of money only, the plaintiff shall insert in the summons a notice that he will take judgment for a sum specified therein. (*Code*, § 129.) If the defendant does not desire to contest this amount, he may suffer judgment to pass by default and without appearance. If he concedes the cause of action to an amount less than that claimed, or is willing to concede something rather than litigate, he may, by way of compromise, make the offer of judgment under this section, and this offer is not confined to actions upon contract. In most cases, this provision is resorted to in fraud of the chapter regulating the confession of judgments, and very seldom to accomplish the good intent of its framers. Perhaps the courts might say, that in cases where the commencement of an action is merely formal, and to enable the defendant to make an offer of judgment, and thus in substance immediately confess a judgment for the demand of the plaintiff, without complying with the statutory forms, it should not stand as against third persons having an interest to question its validity. The proceeding is, however, within the letter of the statute, and in the face of the very general practice sanctioned in part, perhaps, by the acquiescence of the courts. I will not venture to decide now that it must not be tolerated. The question then is, whether these judgments are in conformity with the statute under which they purport to have been entered.

The Code authorizes the defendant to serve upon the plaintiff an offer in writing, to allow judgment to be taken against him for the sum or property, or to the effect therein specified,

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with costs. This privilege is not confined to actions against a sole defendant, but extends to actions against several. Whether all who have been served with process should not join in the offer unless the plaintiff is entitled to judgment by default against those not uniting in the offer, is questionable. The offer should be such and made at such a time, that the plaintiff may at once avail himself of it and take his judgment. If only one of several defendants jointly liable upon the cause of action stated in the complaint, all of whom have been served with process, offers a confession of judgment under this section, while the other defendants may still come in and litigate, the plaintiff may be greatly embarrassed. The one defendant may offer judgment for a sum which the plaintiff might consent to take for the sake of peace, but which he would be unwilling to take except upon that consideration. And if he must still litigate with the other defendants, all inducements to accept the offer are gone. Again; to accept in a case of unliquidated damages, an offer of judgment by one defendant for a specific sum, while the verdict against the other might be for a very different sum, would be out of the question, as no joint judgment could, in that case, be given.

"The defendant," in the section means a sole defendant, or all the defendants who have been served with process, who really make but one "party" to the action. This is the effect of the decision in *La Farge* agt. *Chilson*, (3 *Sandf. Reps.* 752.) The court in that case very carefully limit the right of one or more of several defendants to serve an offer under this section, to the case where the suit is so situated in respect to the other defendants, that the plaintiff may at once enter judgment to the effect offered against all the parties jointly liable with those making the offer, as where the co-defendants' time to answer had expired, and they had not appeared.

In the other cases in which an offer from one of several defendants has been held proper, only the defendants making the offer had been served with process, so that upon accepting the offer the plaintiff was immediately entitled to judgment against all the defendants in form, but which should affect only

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the individual property of those joining in the offer. (*Orwell* agt. *McLaughlin*, 10 *N. Y. Leg. Obs.* 316; *Lippman* agt. *Joelslin*, 1 *C. R. N. S.* 161; *Emery* agt. *Emery*, 9 *How.* 130.) These judgments were sustained under the provisions regulating proceedings against joint and several debtors. (*Code*, § 136.) The rule was the same under the former practice. (*Pardee* agt. *Haynes*, 10 *Wendell's R.* 630.) If the summons be only served on a portion of the defendants jointly indebted, as in this case, the plaintiff may proceed against the defendant served, and if he recover judgment it may be entered against all the defendants, to be enforced against the joint property of all, and the several property of the defendants served, and in the case of joint debtors the judgment must be in form against all. (*Stanwood* agt. *Mather*, 7 *How.* 4.) If all the defendants have been served with process, then the judgment must be joint against all the defendants, except when the demand is such that the plaintiff could proceed against the defendants severally for its collection. Of course, the plaintiff cannot in such case, take judgment in form against all upon a joint demand, before the expiration of the time for all to answer, either by the consent of one of the defendants or because he may be entitled to a judgment by default against one. The judgments in question, are, therefore, not valid judgments under the provisions of the law regulating judgments against joint debtors, and must be supported, if at all, upon the offer of judgment served by Mason.

As a copartner of the other defendants, Mason had no authority to confess the judgment for his co-defendants. The implied agency resulting from the relation of the parties did not extend to an act like that. He could only bind himself. (*Everson* agt. *Gehrman*, 10 *How.* 301; *Barney* agt. *Le Gal*, 19 *Barb.* 592; *Rathbun* agt. *Drakeford*, 6 *Bing.* 375.) In *Emery* agt. *Emery*, (*supra*), it is very clearly put forth, that one partner cannot by a confession of judgment bind his copartners, further than the judgment regularly taken binds the joint property of the defendants not served with process. (*McBride* agt. *Hagen*, 1 *W. R.* 326.) There is no pretence in the opposing affidavits

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of any special authority to Mason to give the judgment to the plaintiff in these actions. The general talk between the partners about securing the debts, or rather about the propriety of securing them, did not, and was not understood by the parties to confer upon either the right to confess a judgment for all, or to do any act to bind the rest beyond the acts which one partner may ordinarily do in the name of his firm.

A judgment was not thought of as a means of security to the creditors. No action had been commenced, and none, so far as we know, was contemplated. The special authority predicated upon the general understanding of the partners that these debts ought to be secured, is evidently an afterthought. The defendants were all served with process on the same day, and on the day the offer was served, and of course were on hand to sign any offer in which they concurred. *Had Mason employed an attorney* to appear for all the defendants, and he had served the offer as such attorney, without fraud or collusion, the judgment would have been technically regular, and very likely within the precedents would have been sustained. (*Grazebrook agt. McCredie*, 9 W. 437; *Church agt. Ten Eyck, Onondaga Special Term*, 1856; *Griswold agt. Griswold*, 14 How. 466.) In that case, the judgments would be upheld in pursuance of the technical rule of practice and somewhat in conflict with another principle advanced by the courts that they "should not sanction any act which would encourage concealment and contrivance between partners, who owe each other confidence and good faith."

The offer of judgment must be in writing. It must be signed by or in behalf of the defendants to be bound by it and against whom judgment is to be taken, and can only be signed in one of three ways. 1st. By the defendants in person, each signing his own proper name. 2d. By an agent especially authorized to sign the same for them and in their name, or, 3d. By an attorney of this court whose authority to represent the parties will be presumed. The offers in these cases were not signed in either of these methods. It is not claimed that they are signed in either the 1st or 3d form. To authorize an en-

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try of judgment upon an offer signed in the manner secondly mentioned, that is by a special agent, some proof of authority should accompany the act, and make a part of the proceedings and record in the case. The special attorney must also be approved and ratified by the court, before he can act as an attorney in the conduct and management of a cause. (*Roy agt. Heily, 1st Duer, 637.*) There is no such special authority, and there is no authority from the court, for Mason to act as special attorney for his co-defendants.

For still another reason, the judgments must be held to have been entered without authority as against Johnson & Hotaling. The offer does not purport to be signed for them or in their behalf. The signature "D. Mason & Co.," does not authorize judgment against them. The addition of "& Co.," to the name of D. Mason, is no authority to the clerk of this court to enter judgment against any one. The law requires certainty in the description of the parties, and those seeking to bind individuals by judicial acts, must see to it, at least that they are properly named. It is not a good judgment even against Mason, for the reason that the papers filed showed service on the other defendants, and that the time for them to answer had not expired. (*Barney agt. Le Gal, supra.*) The moving party may in this case, object to the want of authority in the clerk to enter these judgments. If the plaintiffs are permitted to retain them as against the defendants not uniting in the offer, they will be entitled to take advantage of their own wrong and disregard of the well settled rules of practice, as well as of the statutory provisions under which alone the court by its clerk has authority to take judgment. The moving party here must have commenced his action before the service of the process in these actions, and by the regular course of practice obtained judgment, and yet if these judgments are upheld, these plaintiffs without authority of law and without the assent of two of the three defendants, will be enabled to deprive the Bank of Central New-York of the just reward of its diligence and an adherence to the practice of the court. I do not refer to the omissions of Johnson & Hotaling to move for relief; they may

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have lost the right by laches, but if the judgments were entered without authority, they were void as against subsequent judgment creditors, who are not affected by the subsequent assent or waiver of the defendants.

The judgment must be set aside, with \$10 costs of one motion, unless the plaintiffs elect to retain their judgment and executions against Mason as a several judgment, striking out the name of Hotaling & Johnson from the judgment and the docket.

SUPREME COURT.

JAMES C. POMROY, ELI C. DICKINSON and ALEXANDER W. CLARK, The Board of Commissioners of Excise of Cortland County agt. DANIEL J. SPERRY.

By the act of 1857, to suppress intemperance and to regulate the sale of intoxicating liquors, an action brought to recover a penalty given by said act, for a violation thereof, should be brought exclusively in the name of "the board of commissioners of excise" of the county, the names of the commissioners should not be mentioned. (*See to the same effect, The Board of Commissioners, &c. agt. Doherty, ante p. 46.*)

But where such action was brought in the names of the commissioners, *held*, on the trial at the circuit, that the summons and pleadings might be amended by striking out the names of the commissioners.

The defendant cannot object that the action was prosecuted without the consent of the commissioners of excise. The commissioners alone have the right to make such complaint.

Also, it is for the commissioners to object, not the defendant, that they had not neglected to prosecute the defendant, so as to authorize other persons to prosecute him in the name of the board of commissioners of excise, pursuant to § 40 of the act.

Also, the commissioners have authority under the act to institute actions, whenever they are satisfied penalties have been incurred which are recoverable in the name of the board of commissioners of excise.

Cortland Circuit, June, 1858.

THIS action was brought to recover penalties for violations

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by the defendant of the law of 1857, entitled, "An act to suppress intemperance, and to regulate the sale of intoxicating liquors."

The complaint contained allegations that the defendant had at Cincinnati in the county of Cortland, on certain specified days, sold strong and spirituous liquors and wines, in quantities less than five gallons at a time, without having a license therefor; and that he had forfeited the sum of fifty dollars for each sale.

The answer was, that the commissioners of excise of Cortland county had no right to bring the action, and that they had never authorized its institution in any form or manner.

After the jury was empaneled, the defendant's counsel objected that the action could not be sustained in the names of the commissioners of excise, and that they had no right under the law of 1857, to bring the action. The defendant's counsel then offered to prove that the commissioners of excise had never met nor consulted in relation to bringing the action, and that they had never authorized any person to institute it; also, that no complaint had been made to them that any provision of the act of 1857 had been violated by the defendant, so as to authorize any other person than the commissioners to prosecute him, under section thirty of such act.

The plaintiffs' counsel objected to the evidence offered.

SMITH & DUELL, *counsel for plaintiffs.*

BOURNE, BALLARD & HATHAWAY, *counsel for defendant.*

BALCOM, Justice—held, that the commissioners of excise ought not to have been named as plaintiffs in the action, and that the action should have been brought exclusively in the name of "the board of commissioners of excise," of Cortland county; but he said the plaintiffs' attorney might amend the summons and pleadings in the action by striking out the names of the commissioners, and then the action would stand solely in the name of "the board of commissioners of excise of Cortland county," as plaintiff. And he decided, upon the author-

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ity of the case of *Thayer and another, overseers of the poor of the town of Otsego* agt. *Lewis*, (4 *Denio*, 269,) that the answer did not contain any defence to the action; and said the defendant could not object that the action was prosecuted without the consent of the commissioners of excise; that the commissioners alone had the right to complain that the action had been brought without their authority; also, that it was for the commissioners to object that they had not neglected to prosecute the defendant, so as to authorize other persons to prosecute him in the name of the board of commissioners of excise, pursuant to section thirty of the act under which the action was brought. And he held that the commissioners had authority, under such act, to institute actions whenever they are satisfied penalties have been incurred, which are recoverable in the name of "the board of commissioners of excise." He was, therefore, of the opinion the objections to a recovery in this action, were untenable; that the evidence offered was inadmissible, and directed the jury to find a verdict in favor of the plaintiffs, for \$50; and the jury rendered such a verdict.

COURT OF APPEALS.

ANDREW THOMPSON, Administrator of, &c., CHARLES L. WHITE, deceased agt. ANN BULLOCK and THOMAS RAE, Administratrix and Administrator of ROBERT BULLOCK, deceased.

An order of the supreme court, at general term, striking out of a judgment the costs therein, is not an appealable order to this court.

It is not an order in a proceeding after judgment, affirming the judgment, and based upon and assuming its validity.

June Term, 1858.

THIS action was tried on the 24th day of June, 1854, in

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the supreme court, first district, before Judge MITCHELL, (Charles L. White being plaintiff, and Robert Bullock defendant,) and a verdict obtained by White of \$3.03. Judgment was entered thereon, and affirmed on appeal to the general term of said court, from which an appeal was taken to this court, and the appeal argued on the 1st day of April, 1857, and in the following June term of this court, the judgment of the supreme court was reversed, and a new trial ordered, with costs to abide the event. (*Reported 15 How. 102.*) Charles L. White died March 26th, 1857; Robert Bullock died April 28th, 1857.

On the 29th of September, 1857, this court ordered the remittitur to bear date and be entered as of the first day of March term, 1857; and on the 2d day of January, 1858, the supreme court ordered the remittitur to be filed with the clerk of said court, and judgment to be entered thereon, bearing date March 24th, 1857, reversing the judgment theretofore entered, and directing a new trial, costs to abide the event.

On the 6th day of January, 1858, the supreme court ordered said action to be continued by and in the name of this plaintiff as administrator of, &c., Charles L. White, deceased, against Ann Bullock, administratrix, and Thomas Rae, administrator of, &c., Robert Bullock, deceased, as defendants.

The costs down to the time of the order of continuance, and disbursements, had amounted to \$466.17.

The order of continuance, notice of trial, and notice of service of future papers upon Platt, Gerard & Buckley, were served upon the defendants personally, and on Platt, Gerard & Buckley.

On the 19th of January, 1858, it was agreed to submit the costs for adjustment to the clerk of the supreme court, and Platt, Gerard & Buckley appeared on such adjustment, and the costs were adjusted, after which Rae refused to settle the costs, and the notices were served as above mentioned.

Platt, Gerard & Buckley were the attorneys in the original suit, are still living, and no attorney has been substituted for them in the original action, or as continued.

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The cause was brought to trial in the February circuit, and a verdict taken for the plaintiff, costs taxed upon due notice to Platt, Gerard & Buckley on the 22d day of February, 1858, and judgment entered.

On the 6th of March, 1858, the defendants, by Nelson Smith, Esq., a new attorney, obtained an order to show cause why the costs should not be stricken out of the judgment, and the supreme court at special term, made such order, May 6th, 1858, and the supreme court at general term, affirmed said order on the 14th of May, 1858; from which order the appellant appeals to this court.

ANDREW THOMPSON, *attorney and counsel in person.*

First.—All the proceedings of the appellant down to and entering his judgment, February 22d, 1858, were strictly regular; because—

1st. Platt, Gerard & Buckley are living, and no substitution of another attorney has been made for them. (2 *Rev. Stat.*, 287, § 67.)

2d. All orders down to and including the 2d day of January, 1858, were orders of course, and could have been made *ex parte*. (2 *Rev. Stat.* 386 and 387, §§ 1, 2, 3 and 4; 10 *Wendell*, 601; 12 *id.* 245; 8 *Bingham*, 29; 7 *Cowen*, 281.)

3d. The action continued, and did not abate. (*Code*, § 121.) And the action continuing, Platt, Gerard & Buckley continued the defendants' attorneys—no one being substituted in their place, and they being alive. There is no mode adopted in practice, or directed by statute, by which a plaintiff can get clear of a defendant's attorneys, as long as the suit continues.

4th. The order of continuance of 6th January, 1858, was regularly made on motion, and might be made *ex parte*. (12 *Wend.* 245.) But if required to be made on notice, it was properly made by serving notice on Platt, Gerard & Buckley. (*Code*, § 417; 6 *Dow. & Ry.* 384; 3 *Atk.* 720.)

5th. The cases cited, showing that the death of the principal revokes the authority of the attorney, are all cases of attorneys in fact, and only one *obiter dictum* can be found in

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the books applied to an attorney in a suit, and that was made in *7th Howard's Practice Reports*, 81, in a case where the suit clearly abated, and the defendants were infants.

Second.—If there has been any irregularity, the defendants have waived the same, because—

1st. They have not moved to set aside the judgment or the order continuing the action, and the order appealed from allows the judgment for damages to stand. (4 *Cowen*, 91; 5 *id.* 446; 10 *Johnson*, 486; 10 *Wendell*, 560; 6 *Hill*, 17; 1 *Tidd's Prac.* 562.

Third.—The decision appealed from was made pursuant to 15th *Howard's Practice Reports*, p. 79, which decision, as well as the order appealed from, were erroneous, because—

1st. In this case, it is in conflict with the judgment of this court and the judgment or order of the supreme court, made in conformity therewith, that the costs of the action should abide the event of the suit.

2d. The costs belonged to the action, and on filing the *re-mittitur* in the supreme court, were as much a part of the debt against the estate of Bullock, as the damages. (2 *Pick.* 68; 11 *id.* 389.

3d. The uniform practice has been to collect the costs of the previous proceedings in a judgment in the continued action. (5 *Ham.* 45.)

4th. As to all costs after 6th January, 1858, the defendants are bound to pay the same out of their intestate's property, as well as those that occurred prior to that date. (*Code*, § 317.)

5th. Section 41, p. 90, 2d Revised Statutes, does not apply to this case, as erroneously supposed. That section evidently refers to suits commenced against executors or administrators, and every decision heretofore made so applies it, and there was no law which provided for the continuance of a suit before section 121 of the Code.

6th. If the respondents be correct in claiming that this claim should have been presented to them before the action was commenced, they claim an absurdity, and in opposition

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to section 121 of the Code, if they claim presentment before the continuance, it was presented and adjusted and refused to be paid.

7th. If 15 *Howard*, 79, is to continue an authority, it should not be extended beyond the reasons of that case. That was an application for an allowance and costs; the allowance was denied for a very sufficient reason; the costs were refused, from an inadvertence in quoting the 41st section aforesaid of the Revised Statutes, which it is hoped the judge making the decision, will correct the first opportunity.

The opinion given at general term is clearly wide of the law and all practice.

NELSON SMITH, *attorney, and*

G. DEAN, *counsel for respondents.*

First.—The order appealed from is not appealable. (*Sherman agt. Felt*, 3 *How. Pr.* 425.) The insertion of the costs in the judgment entered in this action was irregular, because—

1st. They were inserted without notice to the defendants. Messrs. Platt, Gerard & Buckley were not the defendants' attorneys. Notice to them was a nullity. The only relation that Messrs. Platt, Gerard & Buckley ever had to the case, was as attorneys for Robert Bullock, defendants' intestate. That relation to the action was a mere incident to the relation of attorney and client, which expired by Bullock's death on the 28th of April, 1857.

An attorney is one who acts for another, by virtue of an appointment by the latter. (1 *Bouv. L. D.* 140.)

The act of the attorney is the act of the principal, and must be in his name, whether he be an attorney at law, or in fact. In either case, the rule is general, that the death of the principal determines the attorney's authority. (*Watson agt. King*, 4 *Camp.* 272; *Story on Agency*, § 448; *Hunt agt. Rousmaniere*, 8 *Wheaton*, 174; *Putnam agt. Van Buren*, 7 *How. Pr.* 35.)

2d. Costs against administrators are not recoverable, of course, in any case. A rule allowing them must first be ob-

tained. (*Winne* agt. *Van Schaick*, 9 *Wend.* 448; *Potter* agt. *Etz*, 5 *Wend.* 74; *Mulheran's Ex'rs* agt. *Gillespie*, 12 *Wend.* 355.)

3d. The defendants in this action are exempted from costs by statute, the plaintiff not having presented his claim, and there not having been any unreasonable delay or refusal to refer. (2 *R. S.* 90, § 41; 4th ed. 275, § 46; *Bullock* agt. *Bogardus*, 1 *Denio*, 276; *Nicholson* agt. *Showerman*, 6 *Wend.* 554.)

The fact that the action was originally commenced against the defendants' intestate, makes no difference. (*McCann* agt. *Bradleys*, 15 *How. Pr. Rep.* 79; *Farren* agt. *Caines*, 5 *Ohio*, 45.)

4th. Although by section 121 of the Code, an action may be continued against an administrator, and that too without presenting the claim, or asking the administrator for payment, or showing that there are any assets from which payment could be enforced, yet the administrator does not, upon such continuance, enjoy the privileges in respect to such action that the deceased did. The deceased might have put an end to the action at any moment, by paying the claim and costs to that time. Not so with the administrator; his course is marked out by statute, (2 *R. S.* 87, §§ 27, 28, 34, 39,) the effect of which is to prohibit, except at the administrator's own risk, any payment of the debts of the deceased, whether in suit or not, however just he may know them to be, until the expiration of the time limited in the notice for claims against the deceased to be presented; until then, he cannot know what claims there are against the deceased entitled to payment from his assets, and cannot safely pay one dollar of the deceased's debts.

The administrator not having it in his power to put an end to such an action, except by payment of the claim, the estate ought to be punished with costs for the want of that payment, which is in effect enjoined by the statute. The allowance of costs in such case would be contrary to the maxim, "that the law shall prejudice no man."

This reasoning applies more particularly to the costs after

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the continuance of the action against the administrator. But it applies to all the costs, as costs do not vest from time to time as the action proceeds.

It is only upon the recovery of judgment, that they are allowed in any case. Until then, it is not known which party will be entitled to costs, and the state of the law as to costs, at the date of the judgment controls. (15 *How. Pr. R.* 79.)

5th. The statute exempting executors and administrators from costs is remedial in its nature, and therefore to be liberally construed. (*Sedgwick on Stat. and Con. L.* 359.) While statutes giving costs are regarded as inflicting a kind of penalty, and to be construed strictly. (*Cone agt. Bowles*, 1 *Salk. R.* 205.)

The order appealed from should be affirmed.

By the court—PRATT, Judge. The order of the court below striking out the plaintiff's costs in this case, is clearly not appealable to this court.

It is claimed on part of the plaintiff, that it is a final order in a summary application after judgment, and affecting a substantial right. We think that the plaintiff's counsel is mistaken in assuming that this order comes under the provision of the Code. It has been repeatedly held by this court, that the final order referred to in that provision of the Code, is a final order in proceedings based upon the judgment, and assuming its validity—such as an application of a judgment creditor for the surplus money arising upon the sale of mortgaged premises upon foreclosure. (*Sherman agt. Phelps*, 2 *Comst.* 186; *Dunlap agt. Edwards*, 3 *id.* 341; *Humphrey agt. Chamberlain*, 1 *Kern.* 274.) The motion in this case was made in the court below upon allegations of irregularity, which went to the validity of a portion of the judgment itself. It does not appear that the supreme court has decided that the plaintiff is not entitled to costs. That court may have only decided that the proceedings of the plaintiff, in procuring the adjustment of his costs, were irregular. At all events,

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an order striking out of the judgment the costs, is not an order in a proceeding after judgment affirming its regularity and validity, and is therefore not appealable within the cases above cited.

Appeal dismissed.

SUPREME COURT.

PHILIP FRENCH and CHRISTOPHER HEISER *agt.* THE MAYOR,
ALDERMEN and COMMONALTY of the City of New-York.

As between landlord and tenant, or lessor and lessee, the word "*improvements*," has a more comprehensive meaning than the word "*fixtures*," and includes the latter.

Therefore, where the lessee covenanted in the lease of Castle Garden, N. Y., at the expiration thereof to quit and surrender to the lessors the premises, "and all the improvements that may have been placed thereon by the" lessees, "which improvements are to belong to the" lessors, &c. *Held*, that such covenant included "gas pipes, burners, gas ladders, gas meters, lumber in hat room, batten doors, hinges and locks, floor of stage, large glass case, benches in gallery, benches under gallery, upholstered wood work, and canvass constituting the stage, gas pendant, under gallery, picket fence on the bridge leading to the garden, sheds on the north and south sides of the building, fixtures and ticket office, board fence on the north side of the building."

General Term, July, 1858.

On the 28th of March, 1843, defendants leased to the plaintiffs the premises known as "Castle Garden," for eleven years from May 1st, 1843.

The lease contained this clause:—"And that on the last day of the said term, or other sooner determination of the estate hereby granted—the said parties of the second part, their executors, administrators or assigns, shall and will quit and surrender unto the said parties of the first part, their successors or assigns, the premises hereby demised, and all the improvements that may have been placed thereon by the said parties of the second part, their executors, administrators or

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assigns, which improvements are to belong to the said parties of the first part, their successors or assigns, and all of which are to be so surrendered up in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted."

May 1st, 1854, the term of the plaintiffs under the lease aforesaid expired.

Before the expiration of their term, the plaintiffs began to remove "gas pipes, burners, gas ladders, and two large and one small meters, lumber in hat room, fifteen batten doors, hinges and locks, floor of stage, large glass case, benches in gallery, benches under gallery, upholstered wood-work and canvass constituting the stage, gas pendant, under gallery, picket fence on the bridge leading to the garden, sheds on the north and south sides of the building, fixtures and ticket office, board fence on the north side of the building."

An injunction was obtained by defendants, April 15, 1854, restraining the plaintiffs from removing or displacing any of these articles. The action was subsequently discontinued, and this action was brought by the plaintiffs to recover the value of the gas pipes, burners, &c., above mentioned. The complaint alleging that the defendants had wrongfully taken and retained the said property.

The cause was tried before Judge DAVIES, at the January circuit in 1857, and a verdict was taken for the plaintiffs for \$4,431.25, subject to the opinion of the court.

WM. M. EVARTS and R. H. BOWNE, *for plaintiffs.*

RICHARD BUSTEED and A. R. LAWRENCE, JR., *for defendants.*

By the court—DAVIES, Justice. The question in this case is not, what are fixtures which a tenant is at liberty to remove on the expiration of his lease? but what did the lessees covenant with the lessors they would surrender and suffer to remain on the demised premises on the termination of the lease?

The covenants of the lease are, that on the last day of the

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term the lessees will surrender the demised premises, "and all the improvements that may have been placed thereon by the said parties of the second part" (the lessees); "and which improvements are to belong to the said parties of the first part" (the lessors), "*and all of which* are to be surrendered up in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted."

The terms of the lease are, therefore, very broad, and would seem to comprehend all and every erection, improvement or addition made, put or erected upon said premises during the continuance of the lease. It was manifestly in contemplation of the parties to the lease, at the time of making it, that extensive improvements, changes or alterations were to be made by the lessees to adapt the demised premises to such uses and purposes as they might wish to put them to, and that these alterations and improvements were to be made at the expense of the lessees.

The lessors consented to such alterations and improvements, on condition that at the expiration of the lease they were to belong and become the property of the lessors; and the lessees, in consideration of such permission to make alterations, repairs and improvements, on the expiration of the lease, to surrender them up in as good state and condition as reasonable use and wear thereof would permit.

The covenant is to surrender *all* the improvements that may have been placed thereon. Improvements, clearly, in the lease here used, embrace every addition, alteration, erection or annexation made by the lessees during the demised term, to render the premises more available and profitable, or useful and convenient to them. It is a more comprehensive word than "fixtures," and necessarily includes it, and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and where the parties say that all improvements which may be placed on the premises shall belong to the lessors, it is difficult to say what, if anything, would be excluded.

Such, we think, is the view taken by the common pleas of

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England in a case not dissimilar to the present. (*West agt. Blakeway, 2 Manning & Granger, 727.*)

In that case the tenant had covenanted to yield up at the expiration of his term, all erections and improvements erected, made, or set up during the term; and it was held that this covenant was broken by the removal of the sashes and framework of a green-house erected during the term, the framework of which was laid upon walls built for the purpose of receiving it, and embedded in mortar thereon.

The judges thought the parties had purposely adopted the words, "erections and improvements" for the very purpose of avoiding all discussions as to what might be considered as coming within the description of a fixture.

It is very apparent that the court, in this case, did not place their judgment on the assumption that the green-house was a fixture, but on the covenant to surrender all erections and improvements, and that those words were more comprehensive than fixtures.

We think the parties in this case intended, the one to surrender, and the other to receive and accept at the termination of the lease, all the improvements which should be placed thereon by the tenants during the lease, and that such improvements embraced all additions, erections or alterations made by the tenants during the term, and such as were used by them in the enjoyment of the lease.

On its expiration, they become the property of the lessors, and they had a right to retain them.

It is difficult to see upon the principles here enunciated, that any of the articles enumerated in the complaint in this action, are not embraced in the covenants of the plaintiffs to surrender them. If any of them are not, then the plaintiffs will be entitled to recover for such, and such only.

A new trial must be had, costs to abide the event.

SUPREME COURT.

ELIZA CONOLLY, appellant agt. CHARLES P. CONOLLY and others.

To entitle a party appellant to review any questions, either of fact or of law, arising upon the trial, or upon the decision, where the action is tried by the court without a jury, or by a referee, a *case* or *exceptions*, which is the same thing under the Code, regularly settled and filed, and made a part of the papers presented to the court, is indispensable.

A judgment record is not a case, nor a bill of exceptions, unless a case or exceptions has been made and settled, and made a part of it.

The exceptions which properly constitute a part of the judgment roll, according to section 281 of the Code, are the case or exceptions provided for by section 268; and these exceptions after they are made, are to be settled and filed within ten days after settlement.

In this case, the only paper served by the attorney for the appellant, upon the respondent's attorney, after the notice of judgment, and before the service of the printed papers, was a *notice* of the exceptions taken by the appellant to the conclusions of law, of the referee, upon the facts found by him. And the printed papers were simply the papers which composed the judgment record, and nothing else; with the addition of the notice of exceptions served as before stated.

The counsel for the appellant insisted that inasmuch as the facts found by the referee, and the conclusions of law thereon, and the attorney's notice of exceptions, all appeared in the record, he had a right to review the judgment upon those exceptions, the same as though a case or exceptions had been made and settled, and formed part of the record. *Held*, that in this, the counsel for the appellant was mistaken.

But it does not follow that such an appeal should be *dismissed*. The appellant however, in such case, is confined to errors appearing upon the face of the record strictly, without reference to matters arising upon, or after the trial, and which properly belong to a case or exceptions.

It seems, the court of appeals do not hold that an appeal cannot be maintained, unless a case or exceptions has been made.

Seventh Judicial District, General Term, June, 1858.

Present, WELLES, SMITH and JOHNSON, Justices.

MOTION to dismiss appeal, on the ground that no case or

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exceptions has been proposed or settled. Cause tried before referee. The facts appear in the opinion of the court.

A. M. BINGHAM, *for motion.*

R. P. WISNER, *opposed.*

By the court—JOHNSON, Justice. The affidavit, on the part of the respondents, shows that no case has been proposed or served by the appellant, upon the appeal, and that none has been made, or settled in any manner, and that the only paper served by the attorney for the appellant, upon the respondent's attorney, since the notice of judgment, and before the service of the printed papers, was a notice of the exceptions, taken by the appellant to the conclusions of law of the referee, upon the facts found by him. The papers on which the plaintiff proposes to review the conclusions of law, have been printed and served, and are, by consent, made part of the papers upon this motion. They are simply the papers which compose the judgment record and nothing else; with the addition of the notice of exceptions served by the appellant's attorney, which is printed with the other papers. Whether this notice was incorporated in the record as one of the papers of which it is composed, or was attached by the appellant's attorney, and printed for the purpose of presenting grounds for review, does not distinctly appear. I infer, however, that it was originally put in with the papers, to make up the record, by the respondent's attorney, as the certificate of the clerk appears at the end of the printed papers, certifying that the foregoing is a true copy of the original judgment roll, and of the whole of such original. So that we have only the judgment record, on which it is proposed to review the conclusions of law, as upon a bill of exceptions. The counsel for the appellant insists that inasmuch as the facts found by the referee, and the conclusions of law thereon, and the attorney's notice of exceptions, all appear in the record, he has the right to review the judgment upon those exceptions, the same as though a case or excep-

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tions had been made and settled, and formed part of the record. In this, the counsel for appellant is clearly in error. No questions whether of fact or of law, arising upon the trial, or upon the final decision, which is only a part of the trial, can be reviewed, except upon a case or exceptions made and settled according to the established practice. Exceptions to the conclusions of law after the decision, must be made and inserted as a part of the case or exceptions, and cannot be raised or argued, upon review, in any other manner. (*Code*, §§ 268, 272; *Hunt agt. Bloomer*, 8 *Kern*. 341; *Johnson agt. Whillock*, *id.* 344; *Smith agt. Grant*, 15 *N. Y. R.* 590; *Olis agt. Spencer*, 15 *How. Pr. R.* 426.) It was never heard in practice, that exceptions taken to the rulings and decisions of courts, could be heard upon a writ of error, or on appeal, which brought up the record of the judgment only. A judgment record is not a case nor a bill of exceptions, unless a case or exceptions has been made and settled, and made part of it. The notice of exceptions to the conclusions of law which appear as part of the record in the printed papers, is properly no part of the judgment record, and ought not to be there. It is a mere notice, and has no place in the record, any more than the notice of trial, or of judgment after the trial. The exceptions or case which properly constitute a part of the judgment roll, according to section 281 of the Code, are the case or exceptions provided for by section 268. And these exceptions, after they are made, are to be settled and filed within ten days after settlement. (*Rule 17.*) When settled and filed according to the practice, they then are properly attached to the record, and form part of it, and not before. A mere notice that a party excepts to a decision, unless served as part of a case, or exceptions with a view of having such case or exceptions settled, is a mere idle ceremony, and can form no foundation for any future proceedings or objection. This practice is now so well settled by the court of appeals, that if we had any doubts as to its propriety, we should not hesitate to adopt it. It would be great injustice to permit an appellant to come here and review a judgment upon excep-

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tions, without a case or exceptions made and settled, upon a simple judgment roll, upon which his adversary would not be heard in the court of appeals, to review questions of law decided here. The Code prescribes that questions, whether of fact or of law, arising upon the trial, can only be reviewed upon a case or exceptions. (*Code*, § 268.) We must hold, therefore, that to entitle a party appellant to review any question, either of fact or of law, arising upon the trial, or upon the decision, where the action is tried by the court without a jury, or by a referee, a case or exceptions, which is the same thing under the Code, regularly settled and filed, and made a part of the papers presented to the court, is indispensable.

We have, heretofore, I believe, in a very few cases, reviewed a judgment upon the judgment record alone, and reversed for errors in the conclusions of law, from the facts found by a referee, where such record contained the report of the referee of the facts found by him, and his conclusions of law thereon, together with the exceptions taken by the appellant, to such conclusions of law. Though generally, in such cases, the report of the referee, and the exceptions, have been treated by the parties as a case or exceptions, within the provision of the Code, for the purpose of reviewing errors of law in the final decision merely.

But whatever may have been our practice in particular instances heretofore, if it has been erroneous, it is time it should be corrected, so as to conform to that of the court of appeals.

It is quite obvious, that it is impossible to review questions of fact or of law, arising during the course of a trial, without a case or exceptions, as without that, the court would have no history, and could have no knowledge of the course of the trial, nor of the questions arising during its progress.

The court of appeals have obviously regarded questions of law, arising upon exceptions to the final decision, as questions arising upon the trial, and thus brought within the provision of section 268 of the Code.

An ordinary judgment roll, furnishes no information of

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what took place upon the trial. That is not its office. It does not state when the trial was had, nor any of its incidents, and it is only by inference that we learn from it that there has been a trial.

It does not follow from this, however, as I think, that the appeal should be dismissed. The right to bring or to maintain an appeal, does not depend upon the parties making a case or exceptions. The only consequence of neglecting to make a case or exceptions is, that the appellant thus situated, loses the right of reviewing any questions which were the subject of objection and exception, leaving his case to stand upon the record proper alone. (*Brown agt. Heacock*, 9 *How. Pr. R.* 345; 3 *Abb. Pr. R.* 115; 4 *id.* 309.) He is confined to errors appearing upon the face of the record strictly, without reference to matters arising upon, or after the trial, and which properly belong to a case or exceptions. I do not understand the court of appeals to have held, that an appeal cannot be maintained, unless a case or exceptions has been made. The motion must, therefore, be denied.

SUPREME COURT.

ROBERT HANDLEY agt. THE MAYOR, ALDERMEN and COMMONALTY of the City of New-York.

A *common law certiorari*, is the appropriate remedy to review the proceedings of a municipal corporation in prosecuting a local improvement, or in assessing or collecting the means to complete it. •

Where there exists no other reason than the alleged invalidity of such proceedings, a court of equity will not assume jurisdiction to review them.

New-York Special Term, May, 1858.

THE plaintiff averred in his complaint, that he was the owner of ten lots of ground on the south side of Fifty-fifth

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street, west of the Eleventh avenue, and of six other lots on the southerly side thereof, also west of the Eleventh avenue; that on the 4th of January, 1850, an ordinance was passed by the defendants, directing that Fifty-fifth street, from Tenth avenue to the Hudson river, be regulated and graded under direction of the street commissioner. The complaint also averred that assessors were appointed to estimate the expense of said improvement, and to make an assessment "upon the owners and occupants of the houses and lots benefited thereby." The street was regulated and graded by the street commissioner, and an assessment was made, which was duly confirmed by the common council.

It was then alleged that each of the plaintiff's lots, were assessed at more than *one-half* of their value as estimated by the *assessors for the ward* in which the lots were situated. That such assessment was an apparent lien upon the plaintiff's property, and a cloud upon his title. That such assessment was illegal and void; but the defendants were about to sell the premises assessed, to satisfy said assessment. Plaintiff demanded an injunction restraining the defendants from selling the premises, &c., and prayed that the assessment might be cancelled.

Demurrer by defendants, for that the court had no jurisdiction of the subject of the action, and that the complaint did not state facts, &c.

J. R. FLANEGAN, *for plaintiff.*

A. R. LAWRENCE, JR., *for defendants.*

CLERKE, Justice. A court of equity will not assume jurisdiction to review the proceedings of a municipal corporation, in prosecuting a local improvement, or in assessing or collecting the means to complete it, if there exists no other reason for its interposition than the alleged invalidity of the proceedings.

The common law writ of *certiorari* is the appropriate remedy in cases of this nature; and it is no reason for granting the

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remedy prayed for in this action, that the defects of which the plaintiff complains, in the defendants' proceeding, do not appear upon the record; that they can only be substantiated by extrinsic proof; and therefore, that the objection could not be raised on a certiorari. (*Mace agt. The Trustees of the Village of Newburgh*, 15 How. Pr. R. 161.

Judgment for defendants on demurrer, with costs.

SUPREME COURT.

CHARLES H. GREEN agt. THE HUDSON RIVER RAILROAD COMPANY.

The common law rule declares that the mere *death of a human being* cannot be complained of as a *civil injury*, to be compensated in damages. The reason of the rule is, *actio personalis moritur cum persona*.

Held, that an action at common law by a husband for the loss of his wife, by the careless and negligent act of a third party, (a common carrier,) can only be sustained where some period intervened between the time of the injury, and the time of dissolution, during which he could be said to have suffered the loss of her service and society, and incurred expense, and underwent anxiety and distress upon her account.

Where death is the concomitant of the collision, and life departs at the instant the shock is received, no action for loss of service can be sustained, because there is no time during her life when it can be said that the husband has lost the service and society of his wife, in consequence of the injury complained of.

Oneida Special Term, June, 1858.

DEMURRER to complaint. The facts will appear in the opinion.

M. S. MILLER, *for plaintiff*.

T. M. NORTH, *for defendant*.

BACON, Justice. The plaintiff in this case was the husband of Eliza Green, who lost her life on the 9th day of

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January, 1856, by a collision of the cars on the defendant's railroad. The complainant avers that the deceased became a passenger on the train from Albany to New-York, under the usual engagement to be safely carried, and that by the gross carelessness and unskillfulness of the defendant's agents, a collision occurred, by means of which the said Eliza "was then and there killed." The plaintiff then avers, that as the husband of the deceased, he has lost and been deprived of the comfort, benefit and assistance of his said wife, in his domestic affairs, which he might, and otherwise would have had, to his damage of fifteen thousand dollars. To this complaint, the defendant interposes a demurrer that it does not state facts sufficient to constitute a cause of action on the part of the plaintiff, and that several causes of action are improperly united.

The case as thus stated, presents the naked question, whether at common law, a husband can maintain an action for an injury to his wife, where the effect is her instantaneous death, as is conceded to have been the fact in this case. I should hardly have deemed the point one that was susceptible of much discussion; but the question has been seriously presented by the plaintiff's counsel, and sustained by an argument of very considerable force and ingenuity. If this question were now for the first time agitated, I should concede that there is great plausibility, at least, in many of the views taken by the counsel, and go far to uphold the right to recover for an injury that strikes the mind as one of the most serious and painful to which we can be subjected, and which, in this particular case, was attended by the loss of a life for which no amount of pecuniary compensation can atone. The counsel for the plaintiff insists that this action can be maintained upon the broad principle that there can be no wrong without an appropriate remedy; that the maxim applicable to personal injuries, of the non-liability of the wrongdoer upon the supervening death of the sufferer, has no relevancy to this case, and as the act of defendant did not amount to a felony, the civil remedy is in no respect lost or impaired.

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But I suppose the question has been too long settled, both in England and in this country, to be disturbed; and that it would savor somewhat more of judicial Knight-errantry than of legal prudence, to attempt to unsettle what has been deemed at rest more than two hundred and fifty years. One of the earliest cases in the books is *Higgins* agt. *Butcher*, which arose in the time of JAMES the First, about the year 1600, and is reported in *Brownlow* and also in *Yelverton*, and cited in *Hoy* with approbation. The case is reported in *Yelverton*, 89 and 90, as follows: "The plaintiff declared that the defendant assaulted, and beat one A., his wife, on such a day, of which she died such a day following, to his damage, &c." And it was moved by Foster Sergeant, that the declaration was not good, because it was brought by the plaintiff for beating his wife, and that being a personal tort to the wife, is now dead with the wife, and if the wife had been alive, he could not, without his wife, have this action; for damages shall be given for the tort offered to the body of his wife, *quod fuit concessum*."

In a note to this case, in *Yelverton*, it is said that as the action was brought to recover damages for the injury to the wife, it is very clear that it could not be supported, and to this effect the case of *Smith* agt. *Sykes*, (1 *Freem.* 224,) is cited.

The next case in the books did not occur, so far as I can discover, until 1808, and arose before Lord ELLENBOROUGH at *nisi prius*. It is the case of *Baker* agt. *Bolton et al.*, (1 *Comp.* 493.) The action was brought against defendants as proprietors of a stage coach, on the top of which the plaintiff and his late wife were travelling from Portsmouth to London, when it was overturned, whereby the plaintiff was bruised, and his wife so severely injured, that she died about a month after. The declaration, among other things, stated that "by means of the premises, the plaintiff had wholly lost, and been deprived of the comfort, fellowship and assistance of his said wife; had suffered great grief and vexation of mind. Lord ELLENBOROUGH instructed the jury that they could only take into consideration the bruises inflicted on the plaintiff, and the loss of his wife's society, and the distress of mind he had

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suffered on her account from the time of the accident till the moment of dissolution. "In a civil court," he adds, "the death of a human being could not be complained of as an injury." In a note, probably of the reporter, at the foot of this case, it is said: "*quere*, if the wife be killed on the spot, is this to be considered *damnum absque injuria*?" And clearly it must be so on the principle announced in the decision.

The doctrine thus laid down by Lord ELLENBOROUGH, has not been questioned in England from that day to this, as a principle of the common law. It is true, the decision was made at *nisi prius*, but it has the sanction of the great name of Lord ELLENBOROUGH, and having been followed ever since without dissent in England, has the authority of a case decided in *Banco Regis*.

The counsel for the plaintiff suggests, and, indeed, strongly insists, that the principle thus adjudged arose out of a peculiarity of the feudal law, which would not allow a prosecution for a civil injury, where the act amounted to a felony. The reason for this is said to be, that the crime worked not only a forfeiture of the feudatory's grant, but extended also to his personal estate, and the felon being also liable to be capitally punished, there would thus nothing be left to satisfy the private demand. This reasoning is somewhat recondite, and certainly has very little application at the present day. It is indeed, said in the case in *Yelverton*, above cited, by one of the justices, that if a man's servant is beaten so that he dies, the master shall not have an action against the wrongdoer for the battery, because the servant dying, it has now become an offence to the crown, being connected with a felony, and that drowns the particular offence and private wrong, and the action is thereby lost. And to this, it is said, the other justices agreed. If this could be deemed law two hundred and fifty years ago, it is not now to the full extent of the doctrine thus laid down, for nothing is clearer than that in England the civil remedy is not gone by reason of the criminal offence, for repeated adjudications have settled the rule, that after a trial and conviction upon an indictment for a felony, the party is

liable to a civil suit for the injury he has occasioned, as he also is where he is acquitted, unless the acquittal was procured by fraud. (*See Latch*, 144; 1 *Hale's P. C.* 546; *Crosby & Long*, 12 *East*, 409.) The offender must first be brought before the criminal tribunal for the crime, in order that the justice of the county may first be satisfied, and after this the way is opened for the injured party to seek his civil redress. It may be remarked in passing, that this doctrine has never been recognized in this country. (*Per PARKER*, C. J., 15 *Mass.* 336.) And in this state it is provided by statute, that the right of action of a party injured by a felony, shall not be in any way affected or impaired by the felony. (2 *R. S.* 292, § 2.)

No such reason as the one above stated for the rule, it may be added, is suggested by Lord ELLENBOROUGH, although the case before him was one in which it would have been pertinent to have alluded to this particular feature of the ancient jurisprudence of the country; but he lays down the broad proposition that, in a civil court, the death of a human being cannot be complained of as an injury. If it were necessary at this day to give a reason for this doctrine, I should think it more natural and obvious to refer it to the old maxim which has obtained from the earliest days of the common law, "*Actio personalis moritur cum persona.*"

In a case which arose in England under the statute of 9 and 10 *Victoria*, known as Lord DENMAN's Act, at the Derbyshire Assizes, before Baron PARKE, the learned judge, in summing up to the jury, remarked that until this act, compensation could not be recovered for the death of an individual, "the ancient common law maxim being," he said, "that the value of life was so great as to be incapable of being estimated by money." This admits the existence of the rule laid down by Lord ELLENBOROUGH, but it is the first time, so far as I am aware, that such a reason has been suggested for it—a reason, it strikes me, much more fanciful than sound, since there are many wrongs, for the redress of which an action is given, but which the instinctive sense of mankind declares are incapable

of being measured by any pecuniary standard which can do more than approach to a compensation.

But without seeking further for the reason on which the rule is founded, it is sufficient for the present purpose, that the rule has long existed in England ; and were other proof wanting, the fact is evidenced in the strongest manner by the existence of the statute of 9 and 10 *Victoria*, before alluded to, and by the recital in the first section : "Whereas, no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer, in such cases, shall be answerable in damages," &c. So good a lawyer as he who drafted this act, would not have put such a proposition in the shape of a legal enactment, nor the Parliament of England engaged in a work of manifest supererogation, unless it had been true that, by the law of the land, as thus far expounded by its authorities, "ancient, constant and modern," in the words of Coke, no remedy whatever existed for the wrong for which it was the purpose of the act to provide a remedy.

It can scarcely be necessary to review, at any length, the cases in this country which have affirmed the same doctrine. They will be found, with a single exception, I think, to follow the same rule, deriving it indeed from the same source, but affirming in the strongest manner its binding authority. The case of *Carey agt. Berkshire Railroad Company*, (1 *Cush.* 475,) was an action on the case to recover by a wife for the loss of her husband by the carelessness of defendant's agents. It was not founded on the Massachusetts statute, which had provided a remedy by indictment and fine, which was bestowed upon the widow and heirs for their indemnity, but was a common law action, seeking a private remedy solely. The court held that the action could not be maintained, and they cite the case of *Baker agt. Bolton*, and the principle laid down by Lord ELLENBOROUGH, with approbation, and add : "Such we cannot doubt is the doctrine of the common law, and it is decisive against the maintenance of this action." In *Hallenbeck agt.*

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Berkshire Railroad Company, (9 *Cush.* 480,) Ch. J. SHAW incidentally alludes to the same doctrine, and says: "It is perfectly well settled as a rule of the common law, that rights of action for injury to the person die with the person, and it was the obvious purpose of the statute to reverse this rule and provide that the right of action should survive" in the cases to which the statute was made to extend. (See, also, 9 *Cush.* 107.)

Expressions of a similar character occur incidentally in other reported cases, recognizing either expressly or by implication the same rule. Thus in *Safford* agt. *Drew*, (3 *Duer*, 637,) HOFFMAN, J., says: "In the first place, it is to be noticed that by the rules of the common law, before the statute, no action could be maintained by the personal representatives of a deceased person for loss or damage resulting from his death." So, also, in *Quinn* agt. *Moore*, (15 *N. Y. Rep.* 486,) COMSTOCK, J., speaking of the case of the mother deprived of the services of her son, by the act which destroyed his life, says: "The common law gave no action for this injury. The statute, possibly with greater justice, declares a different principle, and holds the wrongdoer liable to make compensation." But it is needless to multiply citations, since the cases, wherever they allude to this doctrine directly or by implication, hold the same language. It may be added, however, that in Kentucky, Ohio, and Pennsylvania, decisions have been made, either affirming explicitly the same doctrine, or recognizing the unquestioned existence of the common law rule. (See *Eden* agt. *Lex. and Frank. R. R. Co.*, 14 *B. Mon.* 204; *Wesley* agt. *E. H. and D. R. R. Co.*, 1 *Handy*, 481; and *Miller* agt. *Urmbehoven*, 10 *S. and R.* 81.)

The case of *Plummer* agt. *Webb, &c.*, cited from *Ware's Reports*, arising in the U. S. District Court of Maine, to sustain the opposite view, is not in conflict with the common law rule so well established and recognized so often. It was an action brought by the plaintiff, as the father of a boy who had been cruelly beaten by the defendants, the captain and mates of a ship, the death of the child having resulted from the long continued ill usage he had received. The action was founded

on the assault and battery, and alleged loss of service in consequence of the ill treatment. All the court attempt to decide is, that the remedy for the loss of service did not abate by the death of the child, but this cause of action survived to the parent. The action was not to recover for the death of the child *per se*, but for the loss of service, although if that fact had been established, the death might, perhaps, have been taken into the account by way of enhancing the damages. It appeared, however, in the case, that the boy had been bound to the service of the captain, and thus the relation on which alone the action was grounded not existing between the plaintiff and the child, the court ruled that the action could not be sustained. It will be seen, therefore, that it is no authority to sustain the principle for which it is cited, and whatever fell from the court on this point was incidental, and not necessary to the decision that was really made in the cause.

The only exception then, if exception it can be called, to this uniform current of decisions, is the case of *Ford agt. Monroe*, (20 *Wend.* 210.) As it stands, the case is certainly anomalous—sustained by no precedent, and in plain conflict with all previous authority. As the case is stated, the plaintiff was allowed to recover damages for the death of his son of ten years of age, who was run over and killed by the servants of the defendant, such damages being, among other things, alleged to be the loss of service of the son for a period of ten years, and the sickness of the plaintiff's wife in consequence of the occurrence. What other proof of damages was given does not appear; but as the jury only gave a verdict of \$200, I should infer that the court must have charged on the subject of these special damages claimed with some hesitation. However that may be, when the case came into the supreme court, the main ground relied upon to obtain a new trial, was that the relation of master and servant was not established, and this the court pass upon as *the* question in the case, and all they say upon the subject of damages is in four lines, and is merely to the effect that as they were specially laid and were proved to have been the consequence of the principal act, they

come within the well settled rule of special damages, which amounts to little more than saying they were special, because they were specially laid, a truism that it required no great effort of legal learning to announce. A case thus presented and thus disposed of, can hardly be accepted as an authority which shall overthrow a principle of the common law, so long settled and acquiesced in as to have become quite elementary.

Concerning this case, it is well remarked by Judge MERCALF, in 1 *Cush.* 479, that "no question was there raised concerning the legal right of the plaintiff to recover damages caused by the killing of his son. For aught that appears, that point was assumed and passed *subsilento*, both at the trial and in banc." There is also an incidental reference to this case by Judge BRONSON, in *Pack* agt. *The Mayor of New York*, (3 *Coms.* 493,) where, citing it with an apparent *dubitanter*, he says: "I have a strong impression that the father could recover nothing on account of the injury to the child, beyond the physician's bill and the funeral expenses."

I am constrained by these considerations, to reject the authority of this case, and abide by the common law rule, that an action by a husband for the loss of his wife, by the careless and negligent act of a third party, can only be sustained where some period intervened between the time of the injury and the time of dissolution, during which he can be said to have suffered the loss of her service and society, and incurred expense and underwent anxiety and distress upon her account. Where death is the concomitant of the collision, and life departs at the instant the shock is received, no action for loss of service can be sustained, because there is no time during her life when it can be said that the husband has lost the service and society of his wife in consequence of the injury complained of. This may be thought a narrow ground on which to place any right of recovery, but there is no other on which the common law rule can be overcome, which declares that the mere death of a human being cannot be complained of as a civil injury to be compensated in damages.

I should have been happy in this case to have arrived at a

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different conclusion, but the law will not bend to accommodate our private views or gratify our personal desires. I have no alternative but to administer the law as I find it—no dispensation from its injunctions to stand by its ancient landmarks. "*Non quæta movere*" is a good maxim in jurisprudence, however much it may be disregarded in civil and political affairs.

There must be judgment for the defendant on the demurrer with costs.

NOTE.—Probably it did not occur to the learned judge in deciding this case, to consider the death of the wife as a *loss of property*, as was done in the several actions in the *Wiswall* cases, (see *Yertore* agt. *Wiswall*, ante, page 8,) arising under the statute of 1847-9. Such a construction, as a matter of principle, would seem to apply as well to a common law action, as one under the statute; but would not probably suggest itself as proper without the statute authority, which was claimed for it in those cases.

Is it possible that the *cause of action* in causing death by wrongful act, &c., which has been classed and settled for two hundred and fifty years as one of *personal injury*, is changed by a statute which merely gives the representatives of the deceased party an action for damages in causing such death, which the common law did not give?

It seems to involve this novel proposition, that because a cause of action is such that a party at common law has no remedy on it, and a special statute to give such remedy is necessary, therefore, such statute being remedial, the cause of action is changed.

An "action" is one thing, and a "cause of action" is quite another; it is the latter which survives, and is assignable or not. Hence the necessity in the *Wiswall* cases, of construing a man, like a box of pig lead when lost overboard, as personal property. Having had occasion to express some views in relation to the *survivorship* of an action under the statute of 1847-9, in a note to the case of *Yertore* agt. *Wiswall*, (ante, page 8,) an opportunity is now presented of giving an authority on that subject, not then found, which no good lawyer will question. The statute of 9 & 10 *Victoria*, is very similar to ours in its essential features. In *Broom's Legal Maxims*, (4th ed. 565,) treating of the survivorship of actions, it says: "For a tort committed to the person, it is clear, then, that at common law no action can be maintained against the personal representative of the tortfeasor, nor does it seem that the recent statute, 9 & 10 *Victoria*, c. 93, supplies any remedy against the *executors* or *administrators* of the party who, by his 'wrongful act, neglect or default,' has caused the death of another; for the first section of this act renders that person liable to an action for damages, 'who would have been liable if death had not ensued,' in which case, as already stated, the personal representatives of the tortfeasor would *not* have been liable." If these views are correct, the statute in terms prohibits the survivorship of the action brought under it, and necessarily gives a legislative construction to the cause of action, to wit: that it is the same after as before the death, injuries to the person.—[REPORTER.

SUPREME COURT.

LESTER L. ROBINSON and others agt. EDWARD P. FLINT
and others.

Where the complaint shows by its allegations, a false representation—known by the party making it to be false—made as the foundation of a contract with a person deceived thereby, and damages in consequence of such deception, it states a sufficient cause of action for a false representation.

Under section 167 of the Code, a cause of action in *tort* and a cause of action on *contract*, or for a breach of contract, may be united in one action, where these causes of action arise out of the same transaction.

And by transaction, it is understood the whole proceedings commencing with the negotiation, and ending with the performance of the contract, where the matter in controversy arises out of a contract.

Thus, in an action on a contract for the delivery of a certain quantity and quality of iron, which the defendants represented they had on hand, and were ready to carry out the contract in reference thereto, and the plaintiffs alleged that the defendants, intending to defraud the plaintiffs, made such representations knowing them to be untrue, that the defendants delivered iron of an inferior quality, and the plaintiffs were damaged thereby; and secondly, alleged that the defendants by the same contract agreed to send the iron to San Francisco, but neglected to do so, but delivered iron of an inferior quality, of much less value, and that the plaintiffs sustained damage thereby; it was held on demurrer, that these two causes of action were not improperly united.

New - York Special Term, March, 1858.

THE complaint is demurred to for two causes. First, that it does not set out a good cause of action, and second, that two different causes of action are improperly united.

FOSTER & THOMPSON, *for defendants.*

W. HUDSON, *for plaintiffs.*

INGRAHAM, Justice. The complaint avers sundry contracts made by different persons for furnishing iron to the Sacramento Valley Railroad Company, by which a certain quality of iron was to be furnished at a certain price. The plaintiffs afterwards assumed the contract from the company, provided

it could be carried out as originally contemplated. They then applied to the defendants to ascertain if the iron originally purchased by the company was still on hand in Boston, and whether the defendants would carry out the contract as originally contemplated. It then avers that the defendants, intending to defraud the plaintiffs, represented to them that the iron was still on hand, kept for the company, and that they were in a condition to carry out the contract, when such representations were known to the defendants to be untrue; that in consequence of such false representations they made a contract with the defendants to deliver the said iron; that the defendants delivered other iron of an inferior quality, and that the plaintiffs were damaged thereby.

These facts show a cause of action for a fraudulent representation. What the damages may be, or whether the plaintiffs claim in their complaint damages such as can be recovered in the action, is not a question to arise on demurrer. The demurrer admits all the facts, and the only question is whether a good cause of action is made out by them. Of this there can be no doubt. The complaint shows a false representation, known to be false, made on the foundation of a contract with a person deceived thereby, and damages in consequence of such deception. I know no other requisite to make out a sufficient cause of action for a false representation.

The second cause of demurrer is the improper joinder of actions. In addition to the first cause for the tort, the complaint contains a second cause of action, founded on the same contract, which, after referring to the contract, and averring that the defendants by it agreed to send the iron to San Francisco, states that they did not send the iron before mentioned, but delivered iron of inferior quality of much less value, and that they sustained great damage thereby.

It is contended that this claim arises on the contract, and that the other being in tort, the two causes are improperly joined together.

It must be conceded that causes of action arising out of different transactions must be of one of the classes enumerated

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in section 167, and that one cause for contract and one for tort cannot under such circumstances be united. The latter cause of action is evidently intended to be a claim on contract for not delivering the iron as agreed to by the defendants. It avers no fraud or false representation upon which a tort could be charged, and without that it cannot be said to belong to the same class as a cause of action with the first, unless it can be brought within the provisions of the first subdivision, viz: "Where the several causes of action all arise out of the same transaction, or transactions connected with the same subject of action."

It has been held that causes of action, although arising out of the same transaction, cannot be joined if they are inconsistent with each other. (*Smith agt. Hallock*, 8 How. 73; *Sweet agt. Ingram*, 12 How. 331.)

But I have not been referred to any case where the court have held that two causes of action arising out of the same transaction, and upon both of which a recovery may be had, may not be united even if they differ in their nature, and could not therefore be united if they arose out of different transactions.

The 167th section of the Code provides that the plaintiff may unite several causes of action, whether they be such as were denominated *legal, or equitable, or both, where they all arise out of the same transaction, or transactions connected with the same subject of action.*

The plain reading of this section is, that the plaintiff may unite, first, as many legal causes of action as he pleases, arising out of the same transaction. Second, as many equitable causes of action as he pleases, arising out of the same transaction. Third, as many legal and equitable causes of action as he pleases, arising out of the same transaction. Fourth, as many causes of action as he pleases, arising out of different transactions connected with the *subject of the action.*

In *Smith agt. Hallock*, (8 How. 73,) Justice STRONG says that this section refers to cases which are consistent with each other—not to those which are contradictory.

In *Dorman agt. Kellam*, (4 *Abbott*, 202,) the court held such causes to be improperly united, but those causes did not arise out of the same transaction.

In *Badger agt. Benedict*, (4 *Abbott*, 176,) the point was distinctly held that such causes might be united, viz : one in tort and one in contract, both of which arose out of the same transaction.

By transaction I understand the whole proceedings, commencing with the negotiation and ending with the performance of the contract, where the matter in controversy arises out of a contract, and I see no difficulty in carrying out under the present system of pleading, what is the fair meaning of the words used in the 167th section. The answer is only to be a statement of facts showing that upon each count the plaintiff has no right to recover. The judgment, if on both claims, would only be for so much money, and there is no difficulty now in entering up judgment as formerly, even if the causes are in tort and contract. The only point upon which there would be doubt as to the proper proceeding, might be as to the execution. In one case (tort) it might be against the person, in the other against the property. The answer to this is, if the plaintiff thus unites claims, he loses his right to proceed against the body, and must be content with the other execution.

My conclusion is that the demurrer is not well taken, and that plaintiffs must have judgment.

Judgment for plaintiffs on demurrer, with leave to defendants to answer on payment of costs.

SUPREME COURT.

PETER ARNDT agt. ROBERT L. WILLIAMS, WARREN TANNER
and others.

Common law *rights* of action as they existed at common law, and equitable *rights* as they existed in equity, the legislature did not intend to change by the passage of the Code. But they intended to blend the processes and forms for the enforcement of those rights into a single suit, so that the courts might administer complete justice to the parties in one action, as far as possible.

It is therefore no longer necessary or admissible, to restrain by injunction in one suit, the proceedings in another action pending in the same or another court.

Thus, where a party brought his action in the second district, for the delivery and possession of two canal boats, which he obtained on giving the requisite security under the statute, and pending this action, the party from whom possession was obtained brought an action in the seventh district, claiming the rights of an equitable mortgagee, and a right to redeem said boats and pay off whatever amount was due the party who had obtained possession, also an *injunction* restraining the party in possession from using or disposing of said boats pending the litigation,

Held, on a motion by the plaintiff in the last suit, for the appointment of a receiver, and a motion by the defendant at the same time for a dissolution of the injunction, that to allow the appointment of a receiver, and divest the defendant of the possession he had acquired, and thus draw to the seventh district the litigation between the parties, was entirely inadmissible. The plaintiff might, if he was not obliged to do so, interpose the matters set up in his complaint as an equitable defence to the replevin suit, and thereby obtain such equitable relief as he might be entitled to. The motion for appointment of a receiver denied, and the motion for a dissolution of the injunction granted.

Monroe Special Term, May, 1858.

MOTION by defendants to dissolve injunction, and by plaintiffs to appoint receiver.

The complaint shows that the defendant Newell Chamberlain has acquired the legal title to two canal boats, to which the plaintiff has the rights of an equitable mortgagee; that the plaintiff being in possession, the said defendant Chamberlain commenced an action in this court, claiming a delivery of said boats, in which action the property was taken by the sheriff

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of Kings county, and possession thereof delivered to the said defendant, who has now the same in possession, the said action being still pending and undetermined. The plaintiff claims the right to redeem said boats, and pay off whatever amount is due to the said defendant, as the assignee of the other defendants, for their claim therein—the amount of such debt or claim being in dispute. On the commencement of this suit the plaintiff obtained an injunction restraining the defendants from using, selling or disposing of said boats, and also from further prosecuting the aforesaid action of replevin, and the boats have since remained laid up in one of the docks in Brooklyn, in the possession of the defendant Chamberlain.

The plaintiff now moves for the appointment of a receiver of said boats, and the defendants move for the dissolution of the injunction.

T. HASTINGS, *for plaintiff.*

W. S. BISHOP, *for defendants.*

E. DARWIN SMITH, Justice. By conferring legal and equitable jurisdiction upon the same court, by abolishing the distinction between legal and equitable remedies, by allowing a defendant in an action for the enforcement of a strict legal right to interpose an equitable defence in the shape, and by the name of a counter claim, and by authorizing the court in such cases to give affirmative equitable relief to a defendant, the legislature evidently designed to require that all matters in controversy relating to the same subject matter in litigation should be settled and disposed of in one action.

Such is the obvious policy and general rule of the Code, *which it is the plain duty of the courts faithfully to carry out.* 1) *Selden*, 363; *opinion of FOOT, J., Dobson agt. Pearce*, 2 *Kernan*, 165; *Van Santvoord's Pleading*, 2d ed. 505.)

In abolishing the distinction between legal and equitable remedies, the legislature did not intend to change or affect legal and equitable *rights*, except in respect to the mode of their enforcement. They left common law rights of action as they

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existed at common law, and equitable rights as they existed in equity. But they intended to blend the processes and forms for the enforcement of those rights into a single suit, so that the courts might administer complete justice to the parties in one action, so far as possible, whether their respective rights are in whole or in part legal or equitable. It is therefore no longer necessary or admissible to restrain by injunction in one suit the proceedings in another action pending in the same or another court. (*Foot agt. Sprague*, 12 *How.* 356; 4 *do.* 350; *Hunt agt. Farmers' Loan Co.*, 8 *do.* 416.)

The defendant Chamberlain, who clearly has the legal title to these boats, has commenced his action of replevin for them in Kings county—has obtained possession thereof on giving bail for their return according to the statute, and for the payment of any sum which the plaintiff may for any cause recover against him. The boats are therefore in the custody of the law, the possession thereof pending the litigation being entrusted to the said defendant. To appoint a receiver of such boats in the plaintiff's action commenced in this (*Monroe county*), and thus divest the defendant of the possession thus acquired, and draw to this district and to this county the litigation between these parties, seems to me entirely inadmissible. The plaintiff might, if he was not obliged to do so, interpose the matters set up in his complaint as an equitable defence in the replevin suit, and therein ask, and thereby obtain, such equitable relief as he may be entitled to. It is true that the equitable power and jurisdiction of this court is the paramount power, and the court, in the exercise of its equitable jurisdiction, may and does control and modify legal rights. But this court is a unit, and all its judges exercise equal powers, and any one can, when properly applied to, give equitable relief to parties. The judges of the second judicial district administer law and equity upon precisely the same principles, and in the modes of proceeding, as the judges of the seventh, and are abundantly qualified to protect and enforce the equitable rights of the plaintiff in the suit there pending.

The application of the plaintiff for the appointment of a re-

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ceiver should be denied, and the application of the defendant for the dissolution of the injunction should be granted, with \$10 costs, to abide the event.

SUPREME COURT.

DUDLEY B. FULLER agt. J. W. ALLEN and others.

The process first issued and levied upon personal property, and the sale under such process, conveys to the purchaser the title to the property to the same extent as the sheriff or officer could have given title, *on the day he made the levy*. That is, the sale by the officer relates back to the date of the levy, and conveys all the title to the property, which the officer obtained the day the levy was made.

And such sale cuts off all lien for taxes upon the property, where the levy for the taxes was made subsequent to the levy by the officer on the execution upon which the property was sold.

In the city and county of New York, the warrant to the receiver of taxes to collect the tax, does not authorize him to make a levy. The statute prescribes the mode of making such distress by issuing a warrant to an officer, &c.; and until such warrant is delivered to the officer and levied, there can be no lien for such tax on personal property of the party assessed.

A purchaser of personal property on a sale under an execution, may have an injunction, *pendente lite*, to restrain the taking of such property for taxes claimed to be a lien thereon.

New-York Special Term, May, 1858.

MOTION for an injunction. The facts sufficiently appear in the opinion of the court.

C. N. POTTER, *for plaintiff*.

A. R. LAWRENCE, JR., *for defendants*.

INGRAHAM, Justice. The plaintiff seeks to restrain the defendants from levying a warrant to collect a personal tax from property in his possession, and which he claims to belong to him. The tax was against the New-York and Liverpool

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United States Mail Steamship Company for the years 1856 and 1857; and a warrant was issued on the 2d day of February, 1858, by the receiver of taxes, to one Hillyer, who made a levy on the steamer Atlantic.

On the 28th of January previously, the sheriff had levied an execution against the company on the same steamship, and on the 1st day of April the ship was sold by the sheriff to the plaintiff.

Notwithstanding such sale, the officer still claims a right to proceed against the vessel for the collection of the tax, and threatens to remove therefrom sufficient to satisfy the same. There are some points necessary to be settled in order properly to dispose of the case.

First. The sale by the sheriff to the plaintiff related back to the date of the levy and conveyed to the plaintiff all the title to the property, which the sheriff obtained the day he made the levy on the vessel. See *Butler and others agt. Maynard and others*, (11 Wend. 548,) where it was held that under the Revised Statutes, a levy on personal property defeated a subsequent purchase though *bona fide*, and for a valuable consideration. (See also *Birdseye agt. Ray*, 4 Hill, 162.)

Second. Taxes upon personal property are not a lien upon any specific property, so as to prevent a sale to a *bona fide* purchaser, until a levy is actually made for the collection of such a tax, and then the lien exists only upon the property levied on. (*Preston agt. City of Boston*, 12 Pickering, p. 7.) In *Williams agt. Holden*, (4 Wend. p. 223,) Justice SUTHERLAND says: "Taxes upon personal property are never imposed specifically upon the property itself, as they are upon lands. They are always imposed upon some individual in respect to the property, who in fact, or in judgment of law, has the possession or control of it."

Third. Even if the time of delivery of the warrant to the officer and not the day of the levy, was the date from which the lien on the property occurred, still the levy having been made previous thereto under the execution, it would not avail the defendants in this case.

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Fourth. The warrant to the receiver of taxes to collect the tax, did not authorize him to make a levy.

The statute prescribes the mode of making such distress by issuing a warrant to an officer, &c.; until such warrant is delivered to the officer, there can be no lien for such tax on personal property of the party assessed.

Fifth. From these conclusions it will be apparent that on levying the tax against the company, the officer could not thereby defeat a previous levy made by the sheriff on the same property. The process first issued and levied obtained priority, and the sale under such process, conveyed to the purchaser the title to the property to the same extent as the sheriff could have given title, on the day he made the levy.

A *bona fide* purchaser of the property would therefore obtain a title to the property free from any lien for a tax due by the company. Two questions remain to be examined: one, whether the plaintiff is entitled to the same rights as a *bona fide* purchaser? and second, whether, if he is, an injunction is the proper remedy?

Upon the first question there can be no doubt that the levy upon the furniture and fixtures of the Baltic and Adriatic was void, and gave no lien thereon.

Such levy was not only made after the levy of the sheriff, but after the sale of these vessels had been made to the plaintiff.

The announcement that he had a lien on these vessels for the tax at the time of the sale, amounted to nothing, as he had then made no levy on those vessels, but had actually levied on the other steamer, and had ample property, if the levy was valid, to pay the debt. But notice of such lien was nothing, if in fact no lien existed, and if the levy of the sheriff was entitled to priority, the notice of the officer having the distress warrant did not affect the purchaser or diminish the title which the sheriff had thereby a right to give.

The point upon which I have hesitated is, whether the plaintiff is entitled to the remedy by injunction. The case of *Wilson agt. The Mayor, &c.*, in the common pleas, which has been

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concurred in by the supreme court, and by decisions of judges in this court, establishes, I think, conclusively, that an injunction should not be issued to restrain the collector of taxes from collecting the taxes imposed by proper authority, both on account of the impropriety of thus interfering with the public authorities and preventing them from providing the necessary means for the government of the city, and because the plaintiff, if injured, has other means of redress.

In the present case, however, the application is not to restrain the collection of the tax. The plaintiff asks that property which he has purchased may not be taken to pay the tax of another.

He does not seek to interfere with the officer in any other measures which he may see fit to take as to any property of the party assessed, and in this respect may not come within the provisions referred to.

That the plaintiff has an ample remedy by an action for the trespass upon his property would be clear, if the party committing it was responsible. But as no other person than the officer would be responsible for such trespass, it seems to be an unsatisfactory answer to an application for relief, to turn the party seeking it over to an action against an individual who is not responsible for any damages which might be recovered against him.

In this case, also, it appears that the officer proposes to do serious injury to the plaintiff's property, by removing from all the vessels furniture which is fitted to them, and which at a sale would be of much less value than in the place where such furniture is now placed, and the loss to the plaintiff would be greater than could be compensated for by a recovery of the ordinary value of the property.

I have therefore, but with much hesitation, come to the conclusion to grant the motion for an injunction, so far as to restrain the defendants from removing or selling any of the property in either of the vessels purchased by the plaintiff, but without in any way restraining him from taking any other measures he may see fit to collect such taxes. The defend-

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ants should, however, be fully secured, if it hereafter appears that such lien on the property exists as is claimed by them.

Before signing such an injunction, the plaintiff must either pay into court the amount due upon such tax, or execute a bond with two sureties in a sum sufficient to secure such payment, if hereafter the plaintiff shall fail in this action—such bond or undertaking, if given, to be approved of by one of the justices of this court on two days' notice to the attorney of the defendants.

SUPREME COURT.

HENRY SMITH agt. SALLY BETTS and others.

Where a mutual agreement was, that the plaintiff, in consideration of the payment by the defendants of a certain sum of money on a certain day, and on the delivery to him of certain promissory notes, (without stating any time for the delivery,) he would assign and transfer to the defendants all his interest in a certain bid made by him upon certain real estate, and all his interest in the judgment therein, &c.

Held on demurrer, that on the failure of the defendants to pay the money on the day specified, the plaintiff could maintain his action therefor, without alleging that he had performed, or had offered to perform, the agreement on his part. He was not bound to perform until the defendants had delivered the notes, as well as paid the money. The agreement to pay the money was an independent undertaking.

Albany Special Term, October, 1857

MOTION for judgment on account of frivolousness of demurrer.

The complaint alleges that on or about the 11th of April, 1857, in consideration of the plaintiff's promising and agreeing with the defendants that he would, upon receiving from the defendants a sum of money therein mentioned, and upon certain promissory notes being delivered to him, transfer and assign to the defendants all the rights and interests he then

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owned, by means of moneys paid out by him upon a bid made by him upon the sale of certain real estate under a certain judgment therein mentioned, the defendants promised and agreed with the plaintiff to pay him on the first day of June then next the sum of six hundred dollars, which sum the defendants have neglected to pay.

The defendants demurred to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action. The plaintiff moved for judgment on account of the frivolousness of the demurrer.

HENRY SMITH *plaintiff in person.*

R. W. PECKHAM, *for defendants.*

HARRIS, Justice. The contract set forth in the complaint is mutual. The plaintiff agreed to transfer and assign to the defendants certain rights and interests. But, before doing this, he was to receive from the defendants six hundred dollars, and certain promissory notes were to be delivered to him. Until this should be done, no performance was required on his part. The defendants agreed, on their part, to pay the six hundred dollars on the first of June. No time was fixed for the delivery of the notes. Indeed, according to the terms of the contract, as set forth in the complaint, the defendants did not bind themselves to deliver the notes at all. All they stipulated to do was, to pay the money specified, on a specified day. All the plaintiff stipulated to do was, if the defendants should pay the money according to their agreement, and should, in addition to this, deliver to him certain notes, to transfer and assign to the defendants the rights and interests mentioned. As the contract is stated, it was optional with the defendants whether they would deliver the notes or not, but until these should be delivered, the plaintiff was not bound to perform the agreement on his part.

The agreement to pay the money, on the other hand, was an independent undertaking. The day when it was to be paid was specified. The obligation to pay it was unconditional.

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If the defendants should elect at the same time to deliver the notes, the plaintiff would be bound also to perform the agreement on his part. The case is within the first rule laid down by Sergeant WILLIAMS, in *Pordage* agt. *Cole*, (1 *Saund.* 820 a,) that "if a day be appointed for the payment of money, and the day is to happen, or *may happen*, before the thing which is the consideration of the money, an action may be brought for the money, *before performance*," &c. It was not necessary for the plaintiff, in suing for the money which the defendants had agreed to pay, to allege that he had performed, or had offered to perform, the agreement on his part. He was not bound to perform until the defendants had delivered the notes as well as paid the money. (See *Grant* agt. *Johnson*, 1 *Selden*, 247; *Tompkins* agt. *Elliott*, 5 *Wend.* 496.)

The motion must therefore be granted, but with liberty to the defendants to answer in twenty days after the notice of this decision, upon payment of ten dollars for the costs of this motion.

SUPREME COURT.

JAMES GALLATIN, President, &c. agt. THE ORIENTAL BANK
and others.

A plaintiff cannot be allowed to restrain by *injunction* a defendant from obtaining payment of indebtedness due to him, and tie up and endanger a large amount of property, by preventing the collection of notes and other indebtedness, for the purpose of obtaining by the plaintiff payment of a comparatively small claim. Such a use of the writ of injunction is not warranted; it would create a greater wrong than it was intended to remedy.

New-York Special Term, July, 1858.

MOTION by defendants to dissolve injunction.

E. M. WILLETT, *for defendants.*

F. H. DYKES, *for plaintiff.*

INGRAHAM, Justice. The plaintiff's claim in this case is for about \$3,400. The property held by the bank, and which the plaintiff has enjoined, exceeds in value \$30,000, for which it was transferred as security. The original indebtedness for which it was so transferred is not denied or in any way impeached by the plaintiff in his complaint, but by the injunction all the property is included, and the Oriental Bank is forbidden from receiving or collecting any part of it, or in any manner receiving the notes, &c., as they become due.

Such an injunction appears to me to create a greater wrong than it is intended to remedy. The property claimed under any one of the instruments which the complaint seeks to set aside, would be more than sufficient to secure the plaintiff, if security was necessary. As between the parties to these instruments, it is conceded that they are valid, and that the bank would have a right to payment of Bell's indebtedness from the property so transferred, and yet by this injunction all such payments are prohibited, and the whole property is thus enjoined, when any one was more than sufficient for the purpose. It may be said that the plaintiff was not assured of success in regard to each conveyance, and therefore included all within the injunction. But such a reason is against, rather than in favor of its continuance. The plaintiff should be assured of success before he thus restrains another from obtaining payment of indebtedness due him, and should not thus endanger a large amount of property by preventing the collections of notes and other indebtedness for the purpose of obtaining payment of a small claim. Such a use of the writ of injunction appears to me unwarranted.

The conveyances of the real estate are stated in the complaint to have been made to secure \$18,000, and the conveyances of the personal property show on the face that they were intended to secure upwards of \$12,000. No allegation is made as to solvency of the Oriental Bank, nor any doubt expressed as to their ability to respond in case there should be a recovery against the bank.

So far, therefore, as relates to the bank, I see no reason for

enjoining them from collecting the property, and applying the proceeds to the repayment of indebtedness to them. The plaintiff, if entitled to recover in this action, will be as readily paid by the defendants under the judgment of this court without the injunction as with it, while the continuance of it may work serious injuries to all the parties. The injunction is in no way necessary to the maintenance of the plaintiff's rights; he is in no danger of sustaining irreparable, or, as far as I can see, any injury, if it is not continued, and under such a state of facts, the use of this writ is neither wise or expedient. So far as there may be a surplus in the possession of the Oriental Bank, it may be proper to require them to retain such surplus until the decision of this case. As to any other portion of the property, it is better that it should be converted into cash, and the interest, which otherwise would accumulate, be reduced, than by the continuance of the injunction to add to the amount of the indebtedness.

I do not deem it necessary to discuss the points urged by the plaintiff's counsel on this motion, in regard to the merger of the securities originally held by the bank. As between the parties, it was conceded that the merger was immaterial, because the conveyances operated for the same purpose. As to the plaintiff, it must also be conceded to be immaterial, because the surplus of property is more than amply sufficient to pay the plaintiff, if it shall be held that he has a right to recover.

The injunction must be dissolved, except so far as to require the Oriental Bank to retain all moneys received from the property of the defendant Bell, over and above the amount necessary to pay the indebtedness of Bell to the bank. Costs of this motion to abide event.

SUPREME COURT.

The People *ex. rel.* BENJAMIN F. KIP and JOHN K. LANING,
Overseers of the Poor of the town of Otsego, agt. EDWIN
M. HARRIS, County Treasurer of the county of Otsego.

Under the act of 1857, "to suppress intemperance and to regulate the sale of in
toxicating liquors," the legislature did not intend that *overseers of the poor*
should receive from the county treasurers the excise moneys collected and paid
to them pursuant to that act, even in counties in which a distinction between
county poor and town poor prevails.

The treasurers of such counties are not required to credit *towns* with moneys re-
ceived from the county or *its officers*; they are obliged to credit their counties
with such moneys.

The county treasurers must pay the excise moneys to the county superintend-
ents of the poor, who are authorized to draw on them for the same. *Per*
BALCOM, J.

It seems, that as this money is paid over to the county treasurer for the use of
the poor of the county, the *supervisors* might, in their discretion, distribute it
among the several towns in the proportions it was received from licensees in
the several towns, to be appropriated and used for the poor of the towns. *Per*
CAMPBELL, J.

Sixth District—Delaware General Term, July, 1858.

GRAY, MASON, BALCOM and CAMPBELL, *Justices.*

APPLICATION for peremptory mandamus.

The board of commissioners of excise for the county of Otsego, in pursuance of the act to suppress intemperance, &c., passed April 16, 1857, received in that year, for licenses granted to persons residing in the town of Otsego, as appeared by averments in the alternative mandamus, the sum of \$390, and paid the same over to the county treasurer, in pursuance of the 5th section of that act. A distinction between county poor and town poor prevails in Otsego county, the several towns providing for and supporting their own poor, as provided for and regulated by what is called the Livingston county act. The relators, Benjamin F. Kip and John K. Laning, overseers of the poor of the town of Otsego, demanded

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of the county treasurer the sum of \$390, and upon his refusal to pay the same to them, they obtained an alternative mandamus, requiring him to pay to them that amount or show cause, &c., at the general term. He made return to the writ, among other things, that the board of commissioners of excise, at the close of their session, June 17, 1857, paid over to him the whole amount of excise money received by such board during its session, being \$2,580, and that no portion of that sum was designated or paid to him as money received from residents of the town of Otsego, or of any other town in the county. He also stated in his return that he is not authorized to pay out such money except upon the draft of the county superintendent of the poor, and that neither the county superintendent nor the relators have made any draft upon him for such money or any part thereof, and further, that he is not by law required to pay any part of the excise money to the overseers of the poor of the several towns. The relators demurred to the return, and the defendant joined in demurrer.

L. J. BURDITT, *for relators.*

J. E. DEWAY, *for defendant.*

By the court—CAMPBELL, Justice. Title 1, part 1, chap. 20, § 54, p. 634 of Vol. I R. S., provides: "In those counties where the respective towns are required to support their own poor, the county treasurers thereof shall respectively open and keep an account with each town, in which the town shall be credited with all moneys received from the same or from its officers, and shall be charged with the moneys paid for the support of the poor chargeable to such town."

In § 26, p. 629, same title, it is provided: "In those counties in which the distinction between county poor and town poor prevails, the excise money collected in any town, and all penalties given by law to the overseers of the poor when received, shall be applied to the use of the poor of the town in which such money and penalties shall be collected."

Section 34, title 9, part 1, c. 20, provides that "in those coun-

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ties in which the distinction between town and county poor is or shall be abolished, all moneys received for excise duty in any *city* or *village*, except the city of New-York, shall be paid into the county treasury for the support of the poor."

So section 23 of title 1, part 1, of c. 20, provides that the excise money received by the commissioners of excise in any town, in a county where the distinction between town and county poor had been abolished, should be paid over to the county treasurer.

Title 9, part 1, chap. 20, being the title providing for and stating the duties of the excise commissioners of the various towns, was entirely repealed by chap. 628 of the Laws of 1857. There are no longer excise commissioners for the respective towns. The commissioners are now county officers. By the 5th section of that act they are required to pay over the whole amount of the excise money to the county treasurer—not even deducting their own allowance for their services, the sum allowed to them for their services being paid in like manner as other county charges. That act makes no provision for counties where the distinction between town and county poor is retained. The county treasurer receives no excise money from any town, nor from the officers of any town. The whole amount is paid over to him in gross by the board of county commissioners. The charges of the commissioners for services are audited and paid by the board of supervisors. As this money is paid over to the county treasurer for the use of the poor of the county, the supervisors might doubtless, if they chose, distribute it among the several towns in the proportion it was received from licenses in the several towns, to be appropriated and used for the poor of the towns.

As section 26, title 1, part 1, of c. 20, of R. S., is still in force, and which provides that the excise money collected in any town in counties where the distinction between town and county poor exists, shall be applied to the use of the poor in such town, it may be the duty of the supervisors to make such distribution.

But no such power or duty devolves upon the county treas-

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urer. He can only pay out the money in his hands as required by law. There is no law which authorizes him to audit and settle the accounts of the board of commissioners of excise, and to distribute the net proceeds of the excise money among the several towns. No warrant has been drawn on him in the present case by the supervisors of the county of Otsego, or by the superintendents of the poor of the county, for the money in question.

In my opinion there should be judgment for the defendant.

BALCOM, Justice. There is now a board of commissioners of excise for each county in the state. (*Laws of 1857, Vol. II, p. 405, § 1.*) And each board of commissioners is required to pay all excise moneys to the county treasurer, "for the use of the poor in" the county. (*Id.* § 5.)

The defendant was not furnished with any evidence, as to the residence of the persons from whom the board of commissioners of excise for the county of Otsego, received the \$390, excise money, claimed by the relators. The board paid the same to the defendant with the rest of the excise money which they had received. All the information they gave the defendant, or which they could legally give him, in regard to any portion of the money, was that it was excise money.

The defendant had no authority for ascertaining, upon his own motion, what portion of the excise money was received by the commissioners from residents of the town of Otsego; and it was not in the power of the relators to furnish him with any legal proof that \$390 of the same, was received by the commissioners for licenses granted to residents of that town.

If the legislature had intended that county treasurers should pay the excise moneys received by them, under the act of 1857, "to suppress intemperance, and to regulate the sale or intoxicating liquors," to the overseers of the poor, in counties where a distinction between county poor and town poor exists, it would certainly have required the boards of commissioners

of excise to furnish the county treasurers with statements, showing the amount of moneys received from the residents of each town, so they would know how much of the same to credit to each town, and pay to the overseers of the poor thereof. The legislature has not imposed this duty upon boards of commissioners of excise, or declared that any portion of the excise moneys received under the act before mentioned, shall belong to towns that support their own poor, or be paid to their officers; and I am of the opinion the legislature did not intend that overseers of the poor should receive from the county treasurers the excise moneys collected and paid to them pursuant to that act, even in counties in which a distinction between county poor and town poor prevails.

Under the excise system, contained in the Revised Statutes, the money received by the town boards of excise for licenses, was never paid by them to the county treasurers in counties in which each town supported its own poor. (1 *R. S.* 620, §§ 20, 25 and 26; *id.* 632, § 88; *id.* 2d ed., 640, § 88; 6 *Hill*, 58.) They paid it to the overseers of the poor of each town, where it was received in such counties; but in those counties in which the distinction between county poor and town poor was abolished, they paid it to the county treasurers; (1 *R. S.* 619, §§ 20, 21; *id.* 683, § 31;) and when so paid to them it could not be drawn from them by the overseers of the poor.

In counties where the respective towns are required to support their own poor, the county treasurers are compelled to open and keep an account with each town, in which the town shall be credited with all moneys received from the same or from *its officers*, and shall be charged with moneys paid for the support of the poor chargeable to such town. (1 *R. S.* 626, § 47; *id.* 628, § 55.) But the treasurers of such counties are not required to credit *towns* with moneys received from the county or *its officers*; they are obliged to credit their counties with such moneys.

It was the duty of the defendant to credit the county or Otsego with all the excise moneys received by him from the board of commissioners of excise, for that county, under the

act of 1857, "to suppress intemperance, and to regulate the sale of intoxicating liquors," because the commissioners from whom he received the moneys were county officers.

It is evident that the above-mentioned act of 1857, which repealed all other acts inconsistent with any of its provisions, and particularly that part of the Revised Statutes entitled "of excise, and the regulation of taverns and groceries," takes away the right of overseers of the poor to receive or control the excise moneys, even in counties where a distinction between county poor and town poor prevails.

County treasurers cannot pay or apply any money, except "in the manner required by law." (1 *R. S.* 369, § 20.) And there is no law that requires them to pay the excise moneys received under the act of 1857, to the overseers of the poor of towns which support their own poor, though such moneys were paid in the first place to the commissioners for licenses by residents of such towns. They must pay the excise moneys to the county superintendents of the poor who are authorized to draw on them for the same. (1 *R. S.* 617, § 16, *sub.* 9.)

For the foregoing reasons the relators cannot compel the defendant to pay them any portion of the excise moneys which he received from the board of commissioners of excise for Otsego county, under the act of 1857; the defendant is, therefore, entitled to judgment upon the demurrer to his return to the mandamus, with costs.

Judgment ordered for defendant upon the demurrer, with costs, with leave to the relators to plead to the return in twenty days, on payment of the costs occasioned by the demurrer.

Searll agt. McCracken.

SUPREME COURT.

SEARLL agt. MCCracken.

In an action for maliciously and falsely obtaining an order of arrest against the plaintiff in another action, the complaint is defective where it omits to state that the order of arrest had been vacated, or that judgment had been rendered for the defendant therein, unless it appears that the order was a nullity *ab initio*.

New-York Special Term, April, 1858.

DEMURRER to complaint.

CLERKE, Justice. The complaint does not state that the order of arrest which it alleges the defendant maliciously and falsely obtained against the plaintiff in another action, had been vacated, or that judgment had been rendered for the defendant therein. If the order was a nullity *ab initio*, and could afford no justification, these allegations would be unnecessary. But the order set forth in this complaint is clearly not void. If at all defective, and issued on a false affidavit, it is only voidable; and this must be determined by the competent authority, before an action can be sustained against the persons who procured it. (*Reynolds agt. Corss*, 3 Cai. R. 271; *Burt agt. Place*, 4 Wend. 597.)

Judgment for defendants on the demurrer, with costs, unless plaintiff amend complaint, and pay costs within ten days.

SUPREME COURT.

CHARLES H. GREEN, Adm'r, &c. of ELIZA GREEN, deceased,
agt. THE HUDSON RIVER RAILROAD COMPANY

An action instituted under the statutes of 1847 and 1849, requiring compensation for causing the death of any person by wrongful act, neglect or default, may be sustained by the plaintiff as *administrator of his deceased wife*, for the loss of her life, where the mother of the deceased is the next of kin.

In this case, the complaint, after setting forth the facts of the case, averring the negligence and the instantaneous death caused thereby, alleged that the mother of the deceased, and her next of kin, suffered loss and damage thereby; and averred specially that she was aged and infirm, and dependent upon the deceased for her support, and that by the shock, and the mental distress ensuing, her health had been impaired, and she had become incapable of maintaining herself. (*Several cases reported and unreported arising under these statutes considered.*)

Oneida Special Term, June, 1858.

DEMURRER to complaint.[1]

[1] *Complaint.*—The plaintiff complains of the defendant, and for a cause of action avers, that on the ninth day of January, 1858, the plaintiff was duly appointed administrator of all and singular of the estate, goods, property, effects and credits of the above-mentioned Eliza Green, his wife; and the plaintiff then and there accepted and took upon himself the duties of said trust, and received letters of administration pursuant to said appointment; that the defendant is and was, at the days and times hereinafter mentioned, a corporation or company formed for the purpose of constructing, maintaining and operating a railroad for public use, in the conveyance of persons and property between the city of New-York and the city of Albany, duly organized under the laws of the state of New-York; that on or about the ninth day of January, 1856, Eliza Green deceased, then being the wife of the plaintiff, the defendant, the Hudson River Railroad Company, the consideration that Eliza Green aforesaid would take and engage a seat in the car or coach of the defendant, to be conveyed and carried in and by the defendant's car or coach and locomotive engine, from Albany aforesaid to New-York aforesaid, at and for a reasonable hire and reward, and the usual rate of fair, to wit: the sum of three dollars to be therefor paid in that behalf, *undertook and faithfully promised to carry and convey* the said Eliza in and by the said coach or car, from Albany to New-York aforesaid, and the said Eliza relying and confiding on said promise or undertaking of the defendant, did afterwards, on the day and year aforesaid, *take and engage a seat* in the car or coach aforesaid, to

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be carried as aforesaid, from the city of Albany to the city of New-York; and the defendant was then and there *paid the usual rate of fair, to wit: the sum of three dollars*, the same being a reasonable hire or reward to the defendant for the hire and conveyance of the said Eliza aforesaid; and that the said Eliza did on the day aforesaid, become a passenger upon, and was a passenger in said car, to be carried as aforesaid from Albany to New-York; that the said defendant and its agents, *not regarding the undertaking so made as aforesaid, did not use due and proper skill, and care and diligence* in and about carrying and conveying the said Eliza from Albany to New-York aforesaid, but then and there *wholly neglected and refused so to do*, and on the contrary thereof, the said defendant and its officers and agents so carelessly, improperly and negligently conducted itself in the premises whilst the said car was proceeding from Albany to New-York aforesaid, that through the mere carelessness, unskillfulness and misconduct of the defendant, its officers and agents in and about the conducting and management of the road, cars and locomotives of the defendant, the said car was overtaken, ran into and struck by a locomotive engine and train of cars of the defendant, proceeding from Poughkeepsie to New-York aforesaid, by means of which collision the said Eliza Green was then and there killed, whereby Margaret Ford, the mother of the said Eliza, and the next of kin of the said Eliza Green, suffered great pecuniary loss and damage to a large amount, to wit: in the sum of five thousand dollars; that the said Margaret Ford is and was at the time aforesaid, old and poor, and was wholly dependent upon the said Eliza for support, and unable to maintain herself; that the said Eliza was of sufficient ability, and did contribute to and relieve, maintain and wholly support the said Margaret Ford, during the lifetime of the said Eliza. And he further saith, that by reason of the premises, and the mental distress and grief occasioned thereby, the constitution of the said Margaret Ford has been greatly impaired, and her bodily health and strength destroyed by the killing of her said daughter aforesaid, and by reason thereof, the said Margaret became and is unable to labor, and has sustained great pecuniary loss and damage thereby; and he further saith he has been obliged to pay out, and is liable for large sums of money as administrator as aforesaid, of the estate of the said Eliza, amounting in the whole to the sum of two hundred and fifty dollars, in and about conveying the body of the said Eliza to Utica, her place of residence, and in and about her necessary funeral expenses; and he further saith, that at and by reason of the collision aforesaid, divers jewelry, furs, wearing apparel, *upon the person and in the possession of the said Eliza*, were injured, lost and destroyed, which was of the value, and for which he claims damages as administrator as aforesaid, in the sum of two hundred dollars.

Wherefore the plaintiff demands judgment against the defendant, in the sum of five thousand dollars, besides the costs of this action.

Demurrer.—The defendants demur to the complaint of the plaintiff, and specify as grounds of objection thereto:

1st. That the plaintiff has not legal capacity to sue. 2d. That several causes of action have been improperly united, and are not separately stated. 3. That the complaint does not state facts sufficient to constitute a cause of action.

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II. And the defendants further demur to the alleged cause of action which, in the said complaint, is stated in the words following:

"That on or about the ninth day of January, 1856, Eliza Green, deceased, then being the wife of the plaintiff, the defendant, the Hudson River Railroad Company, in consideration that Eliza Green aforesaid, would take and engage a seat in the car or coach of the defendant, to be carried and conveyed in and by the defendant's car or coach and locomotive engine, from Albany aforesaid to New-York aforesaid, at and for a reasonable hire and reward, and the usual rate of fare, to wit: the sum of three dollars to be therefor paid in that behalf, undertook and faithfully promised to carry and convey the said Eliza, in and by the said coach or car from Albany to New-York aforesaid, and the said Eliza relying and confiding on said promise or undertaking of the defendant, did afterwards, on the day and year aforesaid, take and engage a seat in the car or coach aforesaid, to be carried as aforesaid, from the city of Albany to the city of New-York, and the defendant was then and there paid the usual rate of fare, to wit: the sum of three dollars, the same being a reasonable hire or reward to the defendant for the hire and conveyance of the said Eliza aforesaid, and that the said Eliza did, on the day aforesaid, become a passenger on, and was a passenger in said car, to be carried as aforesaid, from Albany to New-York; that the said defendant and its agents, not regarding the undertaking so made as aforesaid, did not use due and proper skill, and care and diligence in and about carrying and conveying the said Eliza from Albany to New-York aforesaid, but then and there wholly neglected and refused so to do."

And they specify as ground of objection thereto:

1st. That the same does not state facts sufficient to constitute a cause of action. 2d. It is improperly united with another cause of action.

III. And the said defendants further demur to the alleged cause of action, which, in the said complaint, is stated in the words following:

"The said defendant and its officers and agents, so carelessly, improperly and negligently conducted itself in the premises, whilst the said car was proceeding from Albany to New-York aforesaid, that through the mere carelessness, unskillfulness and misconduct of the defendant, its officers and agents in and about the conducting and management of the road, cars and locomotives of the defendant, the said car was overtaken, run into and struck by a locomotive engine, and train of cars of the defendant, proceeding from Poughkeepsie to New-York aforesaid, by means of which collision the said Eliza Green was then and there killed, whereby Margaret Ford, the mother of the said Eliza, and next of kin of the said Eliza Green, suffered great pecuniary loss and damage to a large amount to wit: in the sum of five thousand dollars; that the said Margaret Ford is and was, at the time aforesaid, old and poor, and was wholly dependent upon the said Eliza for support, and unable to maintain herself; that the said Eliza was of sufficient ability, and did contribute to relieve, maintain and wholly support the said Margaret Ford, during the lifetime of the said Eliza."

And they specify as grounds of objection thereto, that the same does not state facts sufficient to constitute a cause of action.

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M. S. MILLER, *for plaintiff.*

T. M. NORTH, *for defendant.*

BACON, Justice. This action is brought by the plaintiff, as administrator of his deceased wife, to recover damages for the loss of her life, which occurred instantaneously by the collision of the cars on the defendant's road, she being a passenger therein at the time. The action is instituted under the statute of this state, requiring compensation for causing the death of any person by wrongful act, neglect or default. The complaint sets forth the facts of the case, averring the negligence, and the death caused thereby, and then alleges that Margaret Ford, the mother of the deceased, and her next of kin, suffered loss and damage thereby, and avers specially that she was aged and infirm, and dependent upon the deceased for her

IV. And the said defendants further demur to the alleged cause of action which in the said complaint is stated in the words following:

"That by reason of the premises, and the mental distress and grief occasioned thereby, the constitution of the said Margaret Ford has been greatly impaired, and her bodily health and strength destroyed by the killing of her said daughter aforesaid, and by reason thereof the said Margaret became, and is unable to labor, and has sustained great pecuniary loss and damage thereby."

And they specify as grounds of objection thereto, that the same does not state facts sufficient to constitute a cause of action.

V. And the said defendants further demur to the alleged cause of action, which, in the said complaint, is stated in the words following:

"And he further saith he has been obliged to lay out, and is liable for large sums of money, as administrator as aforesaid, of the estate of the said Eliza, amounting in the whole to the sum of \$250, in and about conveying the body of the said Eliza to Utica, her place of residence, and in and about her necessary funeral expenses."

And they specify as ground of objection thereto, that the same does not state facts sufficient to constitute a cause of action.

VI. And the said defendants further demur to the alleged cause of action which, in the said complaint, is stated in the words following:

"And he further saith that at and by reason of the collision aforesaid, divers jewelry, furs, wearing apparel, upon the person and in the possession of the said Eliza, were injured, lost and destroyed, which was of the value, and for which he claims damages as administrator as aforesaid, in the sum of two hundred dollars."

And they specify as grounds of objection thereto, that the same does not state facts sufficient to constitute a cause of action.

support, which support was rendered by the deceased; that by the shock and the mental distress ensuing, her health had been impaired, and she has become incapable of maintaining herself.

To this complaint the defendant has interposed a demurrer, which (omitting some special grounds to the form of the complaint) presents the general question, whether sufficient facts are stated to constitute a cause of action.

I shall assume that at common law no right of action whatever exists, or can be maintained by any person, under the circumstances of this case. It is only by virtue of the statute, which was intended to remedy this defect, and reverse the rule of the common law, that this suit can be maintained, and the question then is, is this a case coming within the terms or spirit of the act.

As an original question, I confess my impressions would be strongly against the maintenance of this suit. The intent of the statute being to give a remedy where none existed before; it is obvious to remark that its benefits can only be extended to those who are included within its terms. The first section gives a right of action wherever the party killed would have been entitled to bring a suit for the injury, if death had not ensued. The second section provides that the suit shall be brought in the name of the personal representatives of the deceased person, and that the amount recovered shall be for the exclusive benefit of the *widow and next of kin* of the deceased; and the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just, with reference to the pecuniary injuries resulting from such death to the widow and next of kin of such deceased person. The plain and literal interpretation of this statute would seem to require that the party killed must be one who could, in his or her own right and name, maintain a suit if death had not ensued, and also that there must be both widow and next of kin surviving, in order to authorize a recovery, and that some pecuniary injury must be shown to lay a foundation for damages.

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All the cases, with the exception of a special term decision of Judge HARRIS, reported in 12 *How.* 323, and a case to which I shall refer hereafter, seem to take for granted the first part of this proposition, or at least they were cases where there could be no doubt on this point, because the party injured was a single person. The case of *Lynch agt. Davis*, (12 *How.* 323,) above referred to, was an action brought under the statute by a husband, as administrator of his wife, for alleged malpractice ensuing in her death. Judge HARRIS, among other things, held, that the case was not within the statute, for the reason that the wife, if she had survived, could not have maintained the action, since the suit must either have been in favor of the husband alone, or the husband and wife as joint plaintiffs, and that the case was therefore not within the terms or intent of the statute.

In regard to the other suggested interpretation of the statute, to wit: that there must be both widow and next of kin among whom distribution can take place, in order to ground a right of recovery, several cases have arisen in which the conclusion has been reached, that if there be either a widow, or next of kin surviving, the action can be maintained. In the case of *Safford agt. Drew*, (8 *Duer*, 627,) the plaintiff was the administrator of his son, who it was alleged had lost his life by the wrongful act of the agent of the defendant, and he described himself simply as the father of the deceased. On demurrer the court held the complaint defective, because it did not aver that the deceased left a widow or next of kin. The statute is minutely examined and commented on by Judge HOFFMAN, and he says the court are of opinion that the act may be so interpreted as to allow an action where there is a widow only, or next of kin only, as well as where both are in existence.

In the case of *Quinn agt. Moore*, (15 *N. Y. Rep.* 432,) the party who lost his life, was a child of the age of twelve years, and the action was brought by the administrator for the benefit of the mother, who it was admitted was the sole heir and next of kin to the child; a recovery was had and the judgment was

sustained by the court of appeals. Judge COMSTOCK, in giving the opinion says, that, the only condition on which the right of the administrator to sue under the statute depends, is the common law right of the injured person to maintain an action if he were living, and that it is not required that the person killed should be a husband, father or protector, although the legislature in passing the act were doubtless mainly influenced by the evident justice of compelling the wrongdoer to compensate families dependent, in a greater or less degree, for support, on the life of the deceased.

To the same effect is the case of *Oldfield agt. Harlem R. R. Co.*, (4 Kern. 310,) in which case the court also held that no special pecuniary injury arising from the death need be averred or proved in order to enable the party to recover damages. *Lucas agt. The New-York Central Railroad Company*, (21 Barb. 245,) was an action brought by a husband in his own right, and as administrator of his deceased wife, who was instantly killed while on the cars of the defendant's railroad. The complaint was demurred to both on the ground of misjoinder of causes of action, and because there was no averment that the deceased left any next of kin. It was held defective on both grounds, and the court, Mr. Justice WELLES giving the opinion, say, that if there is neither wife or next of kin, there can be no such pecuniary damages recovered as the act contemplates. They waived the other question as one not necessarily presented, to wit: whether an action would lie for the death of a wife under the statute in any case.

At the Madison circuit in March, 1857, the suit of *Lorenzo Dickens, adm'r of Sally Dickens, his wife agt. The New-York Central Railroad Company*, was brought to trial, and resulted in a verdict for the plaintiff. It was brought under the statute, and the complaint alleged that the deceased was instantly killed by being run over by defendant's cars, and that the plaintiff as her husband, and others the next of kin of the deceased, suffered loss and damage thereby. It was admitted that the deceased left no children or father or mother, but two brothers

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and a sister survived her. A motion for a new trial was made at the general term in the sixth district, and after argument the motion was denied, and the recovery sustained. I have been furnished with the opinion delivered by Judge BALCOM, in which the other judges concurred as is stated, on the ground that the decision in *Quinn v. Moore*, had settled the question that the plaintiff, as administrator of his wife, could sustain the action. In the opinion of Justice BALCOM, it is held that if the plaintiff's wife had not died, the defendant would have been liable to an action for the damages occasioned by the injury. He does not notice the distinction taken by Judge HARRIS, that an action could not have been maintained by the wife if she had survived, but holds that inasmuch as the defendant would have been liable to an action, if the wife had survived, the condition of the statute is fulfilled, and the right of the administrator to sue is clear. He also holds that the action can be maintained by the personal representatives of the deceased, although such deceased person left no husband or wife, or next of kin surviving, who could ever have any legal claim upon such person if living for services or support.

This decision covers all, and more than is claimed on the part of the plaintiff in this suit, for the averment here is, that the deceased left a mother her next of kin, who was dependent on the deceased for her support, and who, by reason of the death, has not only been deprived of this support, but has sustained other specific damages.

I do not profess to be entirely satisfied with the law as laid down in this case, and I follow it with some hesitation. But highly respecting the source from which it comes, and yielding to it as a decision of a co-terminous district, made at a general term, I think I am bound by its authority.

The result is, that there must be judgment for the plaintiff on the demurrer, with leave to defendant to answer on payment of costs.

SUPREME COURT.

MAIN and others agt. POPE.

In granting an allowance under the Code in case of a reference, the certificate of the referee furnished to the court to show what has been done in the case, is proper for that purpose. But the court grants the allowance in such cases.

Where a motion for an allowance is made to a judge at chambers in the first district, on a notice of *two* days, and is opposed without objection as to the time of the notice, it cannot be again raised on a subsequent motion to set aside the order for irregularity.

In the first district, all motions except for new trials may be made at chambers, and this includes motions for an allowance, which are required by the Code to be made by the court.

Besides, an order made at chambers (in the first district) is always made during the term of the court, as a special term is always held during the hours of attending at chambers.

New-York Special Term, July, 1858.

MOTION to set aside an allowance for irregularity.

INGRAHAM, Justice. The judgment in this case was in defendant's favor, and he applied for an allowance, which was granted. The motion was made on a notice of two days to a judge at chambers.

The plaintiff moves to set aside the allowance for irregularity.

1. Because the referee could not grant an allowance. This is so, and it was not in this case granted by the referee. His certificate was furnished to the court to show what had been done in the case, and was proper for that purpose.

2. That the notice should have been a notice of eight days. If such a notice was necessary, unless the time was shortened by the judge, the plaintiff should have made the objection on the day of making the motion. If he suffers a motion to be made on a short notice without objection, he cannot afterwards

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take advantage of it in another motion. He had two days' notice of motion and should have then opposed it.

3. The Code provides that the allowance shall be made by the court, and so does the amendment of 1858. That is the general rule in all motions, but the Code also provides that in the first district all motions except for new trials, may be made at chambers. This includes motions for an allowance. Besides this, an order made at chambers is always made during the term of the court, as a special term is always held during the hours of attending at chambers.

The allowance is small and appears to be proper, and there is nothing in the reasons stated by the plaintiff's counsel to call for an order to vacate the order granting them.

Motion denied.

SUPREME COURT.

VALENTINE FRELIGH agt. JAMES D. BRINK and NOAH SNIDER.

A confession of judgment was made on a statement which reads as follows: "The above indebtedness arose on a promissory note made by the defendants to the plaintiff, dated June 21st, 1854, in the sum of seven hundred dollars with interest; that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of seven hundred and eighty-two dollars and seven cents; together with eighty dollars and forty-one cents, now due the plaintiff from the defendants as costs in an action brought against the defendants by the plaintiff on said promissory note, in the supreme court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants."

Held, that the statement was wholly inadequate to sustain the judgment. The motion to set the judgment aside granted, with \$10 costs,

Orange Special Term, June, 1858.

MOTION to set aside judgment by confession.

SCHOONMAKER & WESTBROOK, *for the motion.*

E. WHITAKER, *contra.*

Freligh agt. Brink.

BROWN, Justice. Jeremiah Russell, a judgment creditor of the defendants, Brink & Snider, moves to set aside the judgment entered by confession in this action, for the insufficiency of the statement, which is in the following words: "The above indebtedness arose on a promissory note made by the defendants to the plaintiff, dated June 21st, 1854, in the sum of seven hundred dollars, with interest, that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of seven hundred and eighty-two dollars and seven cents, together with eighty dollars and forty-one cents, now due the plaintiff from the defendants as costs in an action brought against the defendants by the plaintiff on said promissory note, in the supreme court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants."

So much of the statement as refers to the promissory note as the fact out of which the debt arose, is of no avail to sustain the judgment upon the authority of the case of *Chappell* agt. *Chappell*, (2 *Kernan*, 215,) for the reason there given that the note is but presumptive evidence of the debt, and not the debt itself, which arose out of facts *dehors* the instrument, and antecedent to or simultaneous with its execution. The reference to the note is immediately followed by the words, "that amount of money being had by the defendants of the plaintiff." And the force and validity of the judgment would seem to depend solely upon the sufficiency of the fact therein stated. The case of *Chappell* agt. *Chappell*, is also authority for the construction that "the object of the statute is to improve the condition of other creditors by compelling parties to spread upon the record a more particular and specific statement of the facts out of which the indebtedness arose, thus enabling them by a comparison of that statement with the known circumstances and relations of the debtor, to form a more accurate opinion as to his integrity in confessing the judgment than was possible under the former system." In *Dunham* agt. *Waterman*, (6 *Abbott's Pr. Reps.* 357,) the court of appeals also determined that section 888 of the Code was designed to require by

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implication what the act to prevent abuses in the practice of the law, &c., passed April 21st, 1818, required by express words; that is to say, a particular statement and specification of the nature and consideration of the debt or demand, and in case such demand should arise upon a note, bond or other specialty, that the origin and consideration of the same should be particularly set forth. *Lawless agt. Hackett*, (16 *John. Rep.* 149,) arose under the act of 1818, and it was there held that a statement as general as the common counts in a declaration was not sufficient. In *Dunham agt. Waterman*, the statement was a note given upon settlement of accounts, which was held insufficient, and the doctrine was re-asserted that a statement as general as the common counts was insufficient to sustain the judgment. The account stated, and the *indebitatus assumpsit* for money had and received, &c., were both common counts under the old forms of pleading, and we have seen that a statement of a debt as general, as either is ineffectual to sustain a judgment by confession. The language of the statement in this case is quite as general and is indeed substantially the same, as the language of the count for money had and received, and falls within the principle of the two cases to which I have referred. To say: "that amount of money being had by the defendants of the plaintiff," without saying when and in what sums had or under what circumstances, and for what objects or purposes,—whether as a gift or a loan, or for money collected and misapplied, or in payment of property not delivered, or upon any other contract which the defendants failed to execute, is to withhold and conceal from the other creditors of the defendants the most material facts out of which the debt arose. Suppose the statement had said that the sum of seven hundred dollars was for so much money paid by the plaintiff for the defendants, without saying in what sums, at what times, to what persons, or for what objects and purposes, could it have been regarded as sufficient? Would it have furnished the creditors with any useful information? And would not such a lean and narrow statement have been a clear and pal-

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pable evasion of the spirit of the statute as construed and expounded by the court of appeals?

Regarding the statement as wholly inadequate to sustain the judgment, the motion to set it aside is granted with ten dollars costs to the moving party.

SUPREME COURT.

CAMPBELL, Receiver, &c., agt. FOSTER and others.

Where a *complaint* in the nature of a judgment creditor's bill, does not allege that an execution has been issued to the sheriff of the county where the defendant resides, or if he do not reside in the state, to the sheriff of the county where the judgment roll is filed, and its return unsatisfied, such a complaint is entirely insufficient to authorize an order under § 292 of the Code, for the appointment of a receiver, &c.

Where a judgment debtor has an interest in a trust fund by which he is entitled to a certain portion of the annual profits arising from the principal sum invested, his creditors are entitled to nothing under an order issued in proceedings supplementary to execution, not actually payable to the debtor *at the time the order is issued*.

New - York Special Term, April, 1858.

MOTION to dismiss complaint.

CLERKE, Justice. The validity of the appointment of the receiver depends entirely upon the order issued pursuant to section 292 of the Code. The proceeding authorized by this section is a special proceeding; and no order, at least of a judge out of court, is valid which is not issued on the grounds especially prescribed by the section. Among these essential grounds, it is provided that an execution shall have issued to the sheriff of the county where the defendant resides, or if he do not reside in the state, to the sheriff of the county where the judgment roll, &c., is filed. In the complaint before me no

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such allegation appears, and it is to be presumed, that no such essential fact exists as the residence of the defendant in the county where the execution was issued. For this reason, I think the whole proceedings and the appointment of the receiver are void.

Even if the order were valid, I think the action must fail. It seeks to reach the proceeds of an income accruing after the date of the order. The judgment debtor had indeed an *interest*, employing the word in a general sense, in a trust, which entitled her to a certain portion of the annual profits arising from the principal sum of which the trust consisted. She had an *interest* in this trust, so far as these accruing profits were concerned, but no farther;—I mean she had no such *interest* as would entitle her to the actual control of the subject matter of the property. Her creditors, therefore, are entitled to nothing under proceedings of this nature, not actually payable to her at the time the order is issued. But this complaint claims not only what was due at the time of the date of the order, but a portion of what may accrue from year to year, until the whole debt shall be paid. If a trust of this kind can be at all reached by a creditor, I feel a very strong conviction, that it cannot by any instrumentality of this kind.

Complaint dismissed, with costs.

Smith agt. The New-York and New-Haven Railroad Company.

SUPREME COURT.

CHARLES J. SMITH, Appellant agt. THE NEW-YORK AND
NEW-HAVEN RAILROAD COMPANY, Respondents.

A cause of action against a common carrier for negligence in not delivering specific articles of personal property, is assignable.

Kings General Term, October, 1857.

Present: S. B. STRONG, EMOTT and BIRDSEYE, Justices.

THIS action was commenced by summons issued by a justice of the peace for the county of Westchester, on the 26th day of January, 1856, returnable February 8th, 1856, at which time the parties appeared, and the plaintiff filed his complaint in writing against the defendants as common carriers, for negligence in not delivering to one Sanford Hallock, at Mount Vernon, in said county, four barrels of flour and one barrel of crackers, of the value of \$48.50, with assignment of claim to the plaintiff.

To which complaint the defendants demurred orally: 1st. That the complaint contained no cause of action. 2d. That the said claim was not assignable.

February 23d, 1856. The demurrer was sustained, and judgment was entered for the defendants. January 10th, 1857, the said judgment was reversed by the county court of Westchester county. And an appeal from that judgment was taken to the general term.

P. L. McCLELAN, *for appellant.*

R. H. COLES and CYRUS LAWTON, *for respondents.*

By the court—EMOTT, Justice. In *McKee agt. Judd*, (2 Kern. 622,) the court of appeals held, that where goods had been wrongfully taken and converted, and the owner afterwards having become insolvent, made a general assignment of all his property and things in action for the benefit of his creditors,

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the right of action for damages passed, and a suit could be maintained for the conversion by the assignee; and since the Code in his own name. In *Zabriskie agt. Smith*, (3 Kern. 322,) the same court held that a right of action for damages sustained in consequence of a false representation as to the credit or solvency of a third person, was not assignable. The learned judge who delivered the opinion in the latter case, declares the former decision to be good law, and that the court do not intend to overrule it. It is evident, however, that the present action must come within the decision in *McKee agt. Judd*. Actions and rights of action, for the conversion of personal property, are distinguished from actions for deceit and false representations, it seems, because the former are considered as more properly in the language of the supreme court of Pennsylvania in *O'Donnell agt. Seybert*, (13 Serg. & R. 54,) actions "of property." That is, I suppose, they are actions relating to and founded on the ownership of certain definite articles of property. It is quite obvious, I think, that an action against a common carrier for not transporting specific articles committed to his charge, comes as clearly within this category as an action for taking or detaining such property. If the defendants in this case were charged with absolutely converting this property to their own use, the party who had sustained the injury could assign his right of action for it by the express authority of *McKee agt. Judd*. Would it not be absurd to say that an equally entire loss of the property to the owner, occasioned by the wilful or negligent conduct of the defendants, while intrusted with the property as carriers, will create so different a kind of demand or cause of action, that it cannot be transferred or assigned?

In *Zabriskie agt. Smith*, the learned judge who delivered the prevailing opinion, adopted a test of the assignability of causes in action, which, I think, will clearly sustain the present suit. The rule by which the cause of action in that case was held not to be assignable, was that it would not survive to the personal representatives of a party in case of his death. The same test had been applied in several previous cases. (*Raymond*

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agt. *Fitch*, 2 *Crompt., Mees. & Welsb.* 588; *The People* agt. *Tioga C. P.*, 19 *Wend.* 76; *Comeggs* agt. *Vase*, 1 *Pet.* 218.)

It might be contended that such a case as the present, is clearly within the equity of the statute, giving to executors, &c., actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use the goods of the deceased. (2 *R. S.* 114, § 4.) But there is another statute which was not adverted to by the court in the case in 3 *Kernan*, but by which such a cause of action as the respondent relies upon in this case, will survive in case of a death of a party injured. By 2 *R. S.* 447, § 1, "for wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, such actions may be brought by the person injured, or after his death by his executors or administrators, against such wrongdoer, and after his death against his executors or administrators, in the same manner and with the like effect in all respects, as actions founded on contracts." There is no doubt that the rule of the common law was otherwise, as stated in *Zabriskie* agt. *Smith*. But I am not able to see any greater doubt that this statute was intended to change the rule of the common law, and did establish a different rule as to all cases but those of mere *personal injuries* not affecting property, rights or interests of another as such. The wrong need not be done to any specific property if it affect a *right* or an *interest*. These are terms of wide signification. They might and probably would include the right of personal security and of the enjoyment of character. So the revisers and the legislators seem to have understood and intended. The revisers, in their note to this and the next section, (3 *R. S.* 781, 2d ed.,) say: "The maxim that a personal action dies with the person, has long ceased to be true. Legislatures and courts have steadily and gradually enlarged the liabilities of executors; but there still remain some cases unprovided for. The instance of overflowing land, of deceits and false representations, of violation of duty by public officers, as sheriffs for escapes, &c., and many others, might be mentioned in which injured parties are now

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remediless. The exceptions, it is believed, are all that should be made. The general object of all law being the protection of those under its control, by affording the means of redressing their wrongs, it is not perceived how the death of the wrongdoer should exempt his property from the burden of that redress." The intention is clearly disclosed here to abolish substantially the rule *actio personalis moritur cum persona*, or at least to narrow its application to mere personal torts. That this was the purpose of the revisers, and that it was adopted by the legislature, is, I think, plain from section 2 of the same article which immediately succeeds that which I have quoted, and contains the exceptions referred to in the revisers' note. It declares that the preceding section, "shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person." These exceptions, which are all that were intended or made, show how far the legislature meant to go in preventing the abatement of causes of action. If they do not preserve a right of action for a deceit or false representation, which is not the question here, and which probably was not considered by the court of appeals in *Zabriskie agt. Smith*, since these sections were not adverted to, they must certainly continue a right of action for a neglect of duty in the custody or the conveyance of property. I cannot see any question that such a right of action is within the purview of the first section and not within the exceptions in the second. If this be so, and if the power to transmit to personal representatives and to assign are convertible propositions, as has been said by high authority, then the action was properly brought.

The justice was wrong in sustaining the demurrer, and the judgment of the county court reversing his decision must be affirmed.

Draper agt. Heningsen.

SUPERIOR COURT.

THEODORE S. DRAPER agt. CHARLES F. HENSINGSEN and
WILHELMINA his wife.

Upon a complaint properly framed, and making a case of a charge created by a married woman upon her separate estate, she can be compelled to *discover* every matter as to her estate and her responsibility, which could properly be inquired into if she were a *feme sole*.

And this is so where the husband is a party for conformity merely; and if for want of a proper objection for a misjoinder of causes of action, a bill could be allowed to proceed as against him upon a personal liability, and also against her separate estate, the discovery could not be refused; but the answer of the wife in such case could not be used against her husband.

The rules of a court of equity must in principle be applicable, with the alterations in the method and details of discovery made necessary by the provisions of sections 390 and 391 of the Code. And so far as a married woman could be called upon to discover upon a properly framed bill of discovery before the Code, she may be called upon to answer now.

Upon an application for the examination of a married woman, to discover her separate property, an objection that the complaint does not state facts sufficient to constitute a cause of action cannot be taken. Such an objection, however, can be taken on the trial.

General Term, June, 24th, 1858.

*Before BOSWORTH, HOFFMAN, SLOSSON, WOODRUFF and
PIERREPONT, Justices.*

THIS action was brought against the defendants upon a bill of exchange, drawn by the husband and indorsed by his wife, for \$510.78. The complaint alleged that the consideration for the bill, was the board, meat, drink, lodging, attendance and other necessities furnished by the plaintiff's assignor to the defendants, and for labor and services, and lent money, also performed and furnished to the defendants within a certain period. The complaint then alleged and charged that the defendant Wilhelmina A. Heningsen, the wife of the defendant Charles Frederick Heningsen, was possessed of and owned in her own right and as of her absolute property separate and apart from her said husband, and not subject to his control, and which

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had been acquired and received by her from persons other than her said husband, certain personal property and real estate, far exceeding the sum of \$510.78, and of which she still had the separate use and control, and power of disposition, sufficient to charge and create a lien upon the same by the bill of exchange and the indorsement thereof, specifying on information and belief, said real and personal property so held by the wife; that the plaintiff could not set forth with any greater particularity the description, amounts, character, value, situation or details of any of said property, nor whether the same was incumbered or not, and had no means of ascertaining any of such other details, except from an examination of said defendant Wilhelmina, upon oath, under the order and direction of the court. It was also alleged, that the said Wilhelmina, with a full knowledge of the said consideration of the bill of exchange, and with intent to secure the payment of said sum and to charge and create a lien on her said separate estate and property, and to bind the same for the said sum of money, with the knowledge and assent of her husband, indorsed the said bill, and delivered the same to the plaintiff's assignor, whereby she ordered and appointed the contents thereof to be paid to said assignor; and that afterwards and before the said bill became due, it was presented to the said drawer thereof, who refused to accept the same, whereof the defendants had notice. The plaintiff demanded relief that the said Wilhelmina might set forth and discover upon oath in such manner as the court might direct, the amount, value, character, situations, descriptions, and other details of her said separate property; and that the said bill of exchange and the said indorsement thereof, and the contract and obligation entered into and incurred thereby, which became fixed by the non-acceptance and refusal aforesaid and the notice thereof to her, might be declared by the court a charge and lien in equity upon, and to bind her said separate estate and property, and the income thereof, or at least so much thereof as consisted of personal property, and of the income of the said real estate, to an extent sufficient to pay the said sum of \$510.78 with interest, &c.; and that such separate

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estate and property might be subjected and applied to the satisfaction of said sum, &c. ; and that a receiver be appointed, and injunction issued, &c.

The separate answers of the defendants denied, under oath, specifically and generally, the allegations of the complaint, except that the husband admitted the making, execution and delivery of the bill of exchange, but that it was indorsed by his wife, without any knowledge of its consideration. The defendant Wilhelmina, for a further answer, alleged that at no time or times, as mentioned in said complaint, was she, or was she then possessed of or owned in her own right, or as of her absolute property, any estate, either real or personal or mixed, of any kind or value whatever, except her necessary wearing apparel, which was exempt from execution ; and that at no time or times as mentioned in said complaint, had she owned or had the control of any income or property of any kind whatever.

On the 26th of December, 1857, the following order by the court was made and entered : " At chambers, December 26th, 1857. The plaintiff having duly summoned the defendant, Wilhelmina A. Heningsen, to appear before me and be examined as a witness for the plaintiff, pursuant to section 391 of the Code of Procedure, and having given the notice of such examination required by said section to both the defendants, and the said Wilhelmina appearing before me by her counsel, Edmon Blankman, Esq., and objecting to such examination : Now on reading the pleadings in this action, and hearing said counsel for Wilhelmina A. Heningsen, and A. R. Dyett, Esq., counsel for the plaintiff : Ordered that such examination be and hereby is refused, and that the plaintiff's application for said examination be and hereby is denied, and that said defendant Wilhelmina A. Heningsen be not examined as desired and applied for by the plaintiff as aforesaid, with ten dollars costs, to be paid by the plaintiff to defendants." From this order the plaintiff appealed to the general term.

A. R. DYETT, *for plaintiff.*

E. BLANKMAN, *for defendants.*

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By the court—HOFFMAN, Justice. We do not think that the case of *Hasbrouck agt. Vandervoort*, (4 *Sandford*, 596,) affirmed in the court of appeals, (5 *Selden*, 153,) involves the proposition that the defendant Wilhelmina cannot be examined to any matter whatever, merely because she is a party with her husband on the record, in an action in which judgment can be had against him.

It is not to be contested that upon a bill in chancery properly framed and making a case of a charge created by a married woman upon her separate estate, she could be compelled to discover every matter as to her estate and her responsibility which could be properly inquired into, if she were a *feme sole*. If her husband is a party for conformity merely, no possible difficulty can arise upon proceedings to obtain such a discovery; and if for want of a proper objection for a misjoinder of causes of action, a bill would be allowed to proceed as against him upon a personal liability, and also against her separate estate, it is not perceived that the rule would be inapplicable, and the discovery refused. In such cases, the answer of the wife cannot be used against the husband. (*Anon.*, 2 *Ch. Ca.* 39; *Murray agt. Barlee*, 4 *Simons*, 84, and *Mapes agt. Barlee*, there cited; *Francis agt. Wigzell*, 1 *Mad. Rep.* 238; *Ottway agt. Wing*, 12 *Simons*, 90; 1 *Hoffman's Ch. Pr.* 230, and *a*, and notes; *Codington agt. Earl of Shelbourne*, 2 *Dick.* 475.)

The 389th section of the Code has abolished all bills of discovery, and the method prescribed in the 390th and 391st sections, is the substitute. But the rules of a court of equity must in principle be applicable, with the alterations in the method and details made necessary.

It has been strongly urged that this complaint makes no case against the separate estate of the wife; that it would be held bad upon a demurrer on her behalf. There is great strength in this objection; and it is provided by the 148th section of the Code, that when objections the subjects of demurrer under section 144, are not taken by demurrer or answer, they shall be deemed to be waived, except the objection to the jurisdiction, and that the complaint does not state facts

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sufficient to constitute a cause of action. Accordingly it is held, that the last objection may be taken at the trial. (2 *Duer*, 650; 19 *Barbour*, 186; 3 *Selden*, 469.) It is urged that such an objection must avail on this proceeding.

But in the case in the court of appeals, evidence had been gone into, and the case as presented was, that no cause of action was made out upon the complaint and evidence. It may be remarked that if the objection is taken upon a trial and sustained, the party has the full benefit of reviewing and correcting the decision by an appeal.

But we do not think that this defendant can avail herself upon such an application, as the present of this objection. The principle upon which it would be allowed would admit a party to take the same objection upon any interlocutory motion in the cause, such as for a commission, which certainly would not be justifiable.

It follows that some examination can be permitted. It can be permitted as to the existence, situation and details of her separate estate. It is not proper to attempt to declare in what other, if in any other particulars, it can be allowed. It is sufficient to state that so far as she could be called upon to discover upon a properly framed bill of discovery before the Code, she may be called upon to answer here.

Order at special term reversed without costs.

SUPREME COURT.

TOM E. LEMEN, Respondent agt. DANIEL H. WOOD and others, administrators, &c., of DAVID J. WOOD, dec'd, Appellants. And three other causes between same parties.

Where an action is commenced against the intestate in his lifetime, and after his death is allowed by an order of the court to be continued against his administrators, in pursuance of section 121 of the Code, the administrators are liable for costs, without any application to the court therefor, where the plaintiff succeeds in the action, and is entitled to costs.

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The 41st section, title third, chapter six of the second part of the Revised Statutes, (2 R. S. 99,) which is referred to as the exception contained in section 317 of the Code, contemplates, in connection with several sections which precede it, an action commenced against executors or administrators; not one commenced against the intestate in his lifetime.

Monroe General Term, March, 1858.

Before WELLES, SMITH and JOHNSON, Justices.

APPEAL from order at special term, denying motion by defendants to set aside or modify judgment for plaintiff, by striking out or vacating all of the judgment relating to costs, &c.

S. HUBBARD, *for appellant.*

J. A. VANDERLIP, *for respondent.*

WELLES, Justice. The action was originally brought against David J. Wood, to recover money alleged to be due on contract. The defendant demurred to the complaint, which demurrer was sustained at special term. The plaintiff appealed to the general term from the order sustaining the demurrer, and after the appeal was perfected and before the same was decided, the defendant, the said David J. Wood, died. The action was continued against the above defendants as administrators of the said David J. Wood, deceased, by an order of the court duly made on motion. The general term reversed the order sustaining the demurrer, and the plaintiff perfected final judgment against the above named defendants as administrators of, &c., of the said David J. Wood, deceased, for \$566.56 damages, and \$87.15 costs. The motion was to strike out from the judgment the award of costs, upon the ground that the defendants are administrators, and the judgment for costs was entered without motion to the court therefor and without leave granted by the court.

The defendants claim that the Revised Statutes prohibit a recovery for costs in an action against executors and administrators, unless ordered by the court on application, and rely upon 2 R. S. 90, § 41. The Code, section 317, provides that "in an action prosecuted or defended by an executor,

administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon or collected of the estate, fund or party represented, unless," &c. "But this section shall not be construed to allow costs against executors or administrators, where they are now exempted therefrom by section forty-one of title three, chapter six of the second part of the Revised Statutes," &c.

It is contended on the part of the defendants, that the section of the Revised Statutes, to which reference is made, applies to and should govern the present case. In this, however, I cannot agree. That section clearly contemplates, in connection with several sections which precede it, an action *commenced* against executors or administrators. Here the action was commenced against the intestate in his lifetime, and after his death was allowed by an order of the court to be continued against his representatives, in pursuance of section 121 of the Code. This circumstance distinguishes the case from *Bradley agt. Gould's executors*, (8 Denio, 261,) which is relied upon with much confidence by the defendants' counsel. If we are right in holding that the case is not controlled by the Revised Statutes, then the plaintiff was by section 817 of the Code, entitled to recover costs.

The order appealed from, should be affirmed with ten dollars costs.

Note.

The following letter was received with a request that it be published in the present number :—

"BINGHAMTON, August 31st, 1858.

"N. HOWARD, JR., Esq.

"Dear Sir: I regret that you have published the opinions delivered by me in *The Bank of Havana* agt. *Wickham and others*, and *Roosevelt* agt. *Draper and others*. I request you to say in the next number of your Reports, that you published those opinions without any authority from me.

"The opinion in *The Bank of Havana* agt. *Wickham and others*, was delivered in 1857, instead of 1858; and it was not concurred in by all of the justices who held the term at which the cause was decided. Besides, some portions of that opinion are not correctly printed. The cause in which it was delivered is now in the court of appeals; and I did not intend the opinion should ever be published; certainly not unless I revised it.

"In *Roosevelt* agt. *Draper and others*, an opinion written by Justice HARRIS, was presented by one of the justices who sat in the cause, which I supposed was concurred in by at least one of the justices, and was filed as an opinion in the cause. That opinion should have been published with mine. Besides, the decision was made at a general term, instead of a special term, as stated by you. Sufficient facts are not set forth in either case for a correct understanding of the decision. You will lessen the value of your Reports by publishing opinions without the authority of the judges who write them.

"Respectfully yours,

"RANSOM BALCOM."

NOTE.—It always has been the *general* rule and practice to report in this work no opinions except upon the direct authority of the judges themselves, or sanctioned by them, through responsible attorneys or counsel. It has sometimes happened that this general rule has been departed from, where opinions which seemed to be of considerable importance, having been published in *newspapers*, have been taken therefrom without any other authority for their publication. Such was the case with the two opinions above alluded to by Judge BALCOM. The *Bank of Havana* case was taken from the *Daily Atlas and Argus*, and the *Roosevelt* case was taken from the *New-York Daily Times*, both papers usually very correct in their judicial publications. In the former case there was an editorial article in the paper, calling special attention to the opinion, and stating substantially that from the importance of the question, and the repeated inquiries for the opinion, the editors had procured (without stating from whom) a copy for publication. Nevertheless, Judge BALCOM is entirely correct in stating that no opinion should be reported without the authority of the judge who writes it.—[REP.]

Burt agt. Powis.

SUPREME COURT.

ALEXANDER BURT and JOSHUA BURT agt. RICHARD POWIS.

Where a decision of this court is pronounced at a *general term* thereof, and is made the decision of the court, whether upon a question of *law, equity or practice*, it is *authoritative* upon the questions presented, and binding as such upon the judges of this court, and upon referees, and all other subordinate tribunals, and in all places, until *overruled* on re-consideration by the general term or *reversed* by the court of appeals.

The publication of the opinions of single judges upon practice questions, has doubtless been of much service, and has greatly expedited the construction of the Code, which has called upon the courts to construe and interpret new statutes containing a great variety of new provisions in 473 distinct sections, and served to create a demand for a more extensive publication of the opinions of single judges, than at any former period.

Such publications have disclosed some conflict of views among the judges, but this is of small consequence, when these decisions are considered and regarded as they rightly should be, not as decisive authority, but rather in the light of *sist prius* decisions. But the general term decisions upon questions of practice, should be regarded as authoritative and followed as such, as much so as general term decisions upon questions of law.

In this case, it appeared that the referee in the seventh district, made his report, upon which judgment was entered upon a question of law, which was right in the face and eyes of a reported decision upon the same question of the general term in the fifth district. On appeal, the general term of the seventh district, considered it their duty to reverse the judgment as a matter of course, on looking into the case sufficient to discover such fact.

Argued at June General Term, 1858, at Auburn. Decided, September Term, 1858, at Rochester.

Present: WELLES, JOHNSON and SMITH, Justices.

APPEAL from a judgment entered upon the report of a referee. The facts sufficiently appear in the opinion.

J. T. MILLER, *for appellant.*

GEO. RATHBUN, *for respondent.*

By the court—E. DARWIN SMITH, Justice. The questions arising upon this appeal, are precisely the same presented to

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the court in the case of *Walker agt. Crane*, (17 Barb. 119.) In that case the construction, force and validity of the act of March 16th, 1852, entitled, "An act to facilitate the dissolution of manufacturing corporations in the county of Herkimer, and to secure the payment of their debts without preferences," was elaborately discussed and fully considered.

The able opinion of Judge GRIDLEY in the case, appears to have been concurred in by the four judges of the fifth district, all present at the general term. By chapter 64 of acts of the sessions of 1855, page 65, the provisions of the aforesaid act are applied to the Seneca County Woolen Mills, which brings this case necessarily within the decision in the case of *Walker agt. Crane*, and also within the case of *The Herkimer County Bank agt. Furman*, (17 Barb. 116.) Those decisions both pronounced at the same general term, are authoritative decisions of this court upon the questions presented, and binding as such upon the judges of this court and upon referees, and all other subordinate tribunals, until overruled or reversed. The report of the referee in this action being in distinct conflict with such decision, the judgment entered thereupon must, of course, be reversed.

The referee had no right to disregard the decision of the court upon the express point before him. If there was error in that decision, the court itself at any general term might reconsider and overrule the same. Otherwise, and until that had been done, it was the law of this court binding as *authority* in all places, until reversed by the court of appeals. The fact that the referee in this case, supposed himself at liberty avowedly to render a judgment in open conflict with a decision of the court at general term, and that learned counsel with the above cases before them, should have called upon the referee to do so, seems to imply the prevalence to some extent of a fundamental error in respect to this court, in the assumption that the law is, or may be, different in the different districts of the state. Perhaps some conflict of decision may have given rise to such an impression, and induced counsel to suppose that it was admissible to experiment upon the possibility of obtain-

ing a different decision in one district from the decision of another. But I do not think this court in any of its branches deserves the reproach of countenancing any such experiments. Upon questions of law, the conflict of opinions between the decisions of the judges in the several districts of the state, is quite infrequent. I do not think that in the 25 volumes of Barbour, more cases are overruled or doubted or dissented from, than occurs in any 25 successive volumes of the reports of the decisions of this court from *Caines* to *Denio* inclusive. Some contrariety of decisions doubtless, has existed upon questions of practice. This, perhaps, was incident to the measure of introducing an entire new system of practice and proceedings, and in some degree unavoidable.

The Code called upon the court to construe and interpret new statutes containing a great variety of new provisions in 478 distinct sections. A demand was thereby created for the publication of practice decisions, which has been much more extensive than at any former period, and too many cases have doubtless been reported. The publication of the opinions of single judges, however, upon practice questions, has doubtless been of much service, and has greatly expedited the construction of the Code, and tended to secure uniformity of practice, much sooner than would otherwise have been the case. Such publications have disclosed some conflict of views among the judges, but this is of small consequence, when these decisions are considered and regarded as they rightly should be, not as decisive *authority*, but rather in the light of *nisi prius* decisions. But the general term decisions on questions of practice should be regarded as *authoritative* and followed as such, as much so as general term decisions upon questions of law. This court consists of thirty-three judges, any three of whom are authorized to hold a general term of the court, and at such term to declare finally the opinion of the court upon any questions presented. Cases at general term are much more carefully argued than at the special terms, and much more carefully considered and deliberately decided, and it will rarely happen that any injustice will be done or injury ensue from regarding the

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decision of the general term on questions of practice as final and conclusive, until at least the error, if it be one, can be corrected at the biennial convention of the judges, where all disputed questions of practice can be conclusively settled. There is the more reason for adhering to this rule on questions of practice, inasmuch as it is the only mode of maintaining that uniformity of practice so essential and which it is the obvious duty of the court to promote and preserve as far as practicable.

These views are not new in this district. Since the foregoing was written, my attention has been called to the case of *Fox agt. Woodruff*, (9 Barb. 498,) where my brother WELLES, says: "A decision of one of the general terms of this court, when deliberately made, should receive the same respect in each of the other districts, and be regarded as of equal weight as authority, as if made in the same district and by the same justices."

Judgment reversed.

SUPREME COURT.

HOUSE and others agt. COOPER and others.

It has been frequently decided that an action may be maintained for a damage sustained by a stockholder from illegal and fraudulent acts of directors and officers of the company.

Where the complaint claims by stockholders the equitable interposition of the court on behalf of a non-resident or foreign corporation, and against a resident corporation, and against several individuals who it does not appear are residents of this state, and does not state that the plaintiffs are residents of this state, and it does not appear that the cause of action has arisen, or that the subject of the action is situated within this state;

Held, that such an action cannot be maintained. For no effectual relief can be given without retaining the foreign corporation as parties, and the allegations are entirely insufficient to meet the requirements of the statute in actions against foreign corporations.

Such a complaint is also defective where it omits to state that the directors of the

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foreign corporation on whose behalf the plaintiffs undertake to sue, refuse to bring any such action.

It is an improper joinder of causes of action to join one for equitable relief against a corporation, with a claim for damages against individual defendants.

New-York Special Term, April, 1858.

MOTION to dismiss complaint.

CLERKE, Justice. This court has frequently decided that an action may be maintained for a damage sustained by a stockholder from illegal and fraudulent acts of directors and officers of a company. But this action contemplates much more than this. It claims the equitable interposition of this court on behalf of the Boston and New-York Telegraph Company, incorporated and existing in Massachusetts, against the Commercial Telegraph Company, also incorporated and existing in Massachusetts, against the American Telegraph Company, formed under the laws of this state, and against several individuals, who it does not appear are residents of this state.

So far as the two corporations of Massachusetts are concerned, I cannot perceive how this action can be maintained against them, and if it cannot be maintained against them, I am unable to discover how it can be maintained at all. For no effectual relief can be given without retaining those corporations as parties in the action. An action against a foreign corporation can be brought in the courts of this state only, 1st. By a resident of this state, for any cause of action. 2d. By a plaintiff not a resident of this state, when the cause of action has arisen, or the subject of the action is situated within this state. The complaint does not state that the plaintiffs are residents of this state, to entitle them to maintain an action against a foreign corporation for any cause of action; and further, it does not appear that the cause of action has arisen, or that the subject of the action is situated within this state. On the contrary it appears, and is affirmatively alleged, that the cause of action arose in the state of Massachusetts.

The complaint also omits to state, that the directors of the Boston and New-York Telegraph Company, on whose behalf

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the plaintiffs undertake to sue, refuse to bring any action to set aside the sale to Keith. Kennedy says, that they *will* not bring any such action. I think it is necessary to show, in order to warrant the interference of individual stockholders, that the constituted representatives of the company whose especial duty it is to vindicate its rights, have been requested to institute proceedings for that purpose, and have refused to do so. The defendants' fourth objection to this complaint, I also consider to be well taken. In this action, which is one for equitable relief, the plaintiffs join a claim for damages against individual defendants. This is an improper joinder of causes of action; the one seeks redress, that can be determined only by a judge presiding at special term; the other can be determined only by a jury at the circuit, except where the parties expressly waive a jury at the time of trial. For this and other reasons, which it would be superfluous to mention, this action cannot be maintained, at least in its present shape. Complaint dismissed with costs, unless the plaintiffs amend their complaint within ten days, and pay the costs of the term.

SUPREME COURT.

HARVEY CHURCH agt. JONATHAN W. FREEMAN and others.

Issues of fact in *common law* actions must be tried by a *jury*, unless the parties choose to waive this right. But it is for the *court* to say, in *other cases*, whether an issue of fact shall be tried by a jury or by the court without a jury. It is the right of the court in every case embraced in the 254th section of the Code, to have the aid of a jury upon the trial, and to submit to its determination as many or as few of the questions of fact presented by the pleadings, as it may deem expedient. Nor does it lie with the parties, as it seems sometimes to have been supposed, to determine whether an issue or a specific question of fact shall be tried by a jury. Upon the application by either party upon ten days' notice for such a trial, the court may or may not direct that the issues

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be tried by a jury. But if the application be denied, or if no application be made, the court still has the power at the trial to order the whole issue, or any specific question of fact involved therein, to be tried by a jury.

Albany Special Term, August, 1857.

MOTION to settle issues, &c.

From the year 1844 to May, 1847, the plaintiff and the defendant Gurdon Grant, together with George Coffin, were partners in the lumber business at Troy and West Troy, under the firm of Grant, Coffin & Church. The defendant Freeman was also engaged in the manufacture of lumber at Glens Falls, in the county of Warren.

On the first of January, 1845, an agreement was entered into between Freeman and Grant, whereby they were to become jointly interested in the purchase of a tract of lumber land in the county of Essex, and in the purchase and manufacture of other lumber. The lumber manufactured under this arrangement was from time to time forwarded to the firm of Grant, Coffin & Church, to be sold upon commission.

On the 14th of January, 1847, Grant executed an instrument whereby he declared that the plaintiff was to be deemed interested in the property held under the agreement of the first of January, 1845, to the extent of one-third of Grant's half, as fully as if he had been named and made a party to the articles of copartnership. Grant further agreed, that whenever he settled with Freeman, he would pay over to the plaintiff his share of the amount received. At the same time, Freeman signed an instrument, whereby he consented to the arrangement with the plaintiff, constituting him a partner in the business mentioned, in all respects as fully as if he had been a party to the original agreement of January 1st, 1845.

In May, 1847, the firm of Grant, Coffin & Church, was dissolved. The defendant Cameron became the assignee of the interest of Coffin, and the business was continued by Grant and Freeman with the plaintiff, under the firm of Grant, Freeman & Church.

On the first day of February, 1853, Freeman paid to Grant

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\$5,000, in full payment of his interest in the agreement of the first of January, 1845.

The plaintiff, after setting forth these facts in his complaint, alleged that the settlement between the defendants Freeman and Grant, was made without his authority, and with full knowledge on the part of Freeman, that the sum paid by him was less by \$25,000 than the one-half of the profits of the adventure and business mentioned in the agreement of January 1st, 1845; that Freeman, in order to procure a receipt in full, which was executed by Grant, falsely represented to Grant and to the plaintiff, and Grant relied upon the representation, that the sum of \$5,000 was the full amount of the net profits of said adventure and business, well knowing, as the fact was, that Grant and the plaintiff were ignorant in regard thereto; and that Freeman received the receipt from Grant, after the plaintiff had protested against the giving thereof, and with full knowledge by Grant and Freeman, that the plaintiff did not and would not assent thereto. The plaintiff further averred that there never had been an accounting in relation to the business or adventure, or the expenses thereof, or receipts from sales of lumber; that Freeman had conveyed the land and received therefor a large sum of money, for which he had never accounted, and with the exception of the sum of \$5,000 paid to Grant, he still had the proceeds of the land and the entire net proceeds of the adventure and business in his hands unaccounted for, and claiming the same absolutely as his own, and insisting that the receipt executed by Grant, is a perfect discharge from all further liability to account.

The plaintiff claimed judgment that the parties to the action should account in reference to the adventure or business, arising out of the agreement in question, and that upon such accounting, Freeman should be allowed one-half the net profits of the adventure or business, and the plaintiff one-sixth, Grant one-sixth, and Cameron, as the assignee of Coffin, the other sixth.

The defendant Grant, in his answer, denied that the settlement with Freeman was made without the knowledge or au-

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thority of the plaintiff. On the contrary, he averred that the receipt executed upon such settlement, is in the handwriting of the plaintiff, and was executed with his full knowledge and assent. He also denied specifically all the allegations of fraud and misrepresentation on the part of Freeman alleged in the complaint. The answer of Freeman is substantially to the same effect. Cameron did not answer. Within the time limited by the 69th rule of the court, the plaintiff gave notice of this application.

W. A. BEACH, *for plaintiff.*

A. B. OLIN, *for defendant Freeman.*

J. H. REYNOLDS, *for defendant Grant.*

HARRIS, Justice. When the distinction between suits in equity and actions at law prevailed, the court might, in a suit in equity, direct issues to be framed and questions of fact to be tried by a jury, when in its opinion the proceedings would be thereby expedited, or costs diminished, or the ends of justice promoted. And when no such order had been made before the hearing, it was competent for the court, upon the trial, to award an issue to determine any question arising upon the evidence. (*See The New-Orleans Gas Light and Banking Company agt. Dudley*, 8 *Paige*, 452.)

I understand the practice to be substantially the same under the Code. The 253d section provides for the trial of issues of fact in common law actions by a jury. The 254th section declares that "every other issue," which, of course, embraces actions of an equitable nature, is triable by the court. But the section proceeds to declare that the court may order the whole issue, or any specific question of fact involved therein to be tried by a jury. In all this class of cases, the mode of trial is a question addressed to the discretion of the court. If the nature of the issue is such, that a trial by jury will be likely to subserve the ends of justice, and facilitate the determination of the action, that mode of trial should be adopted; if not, the case should be tried without a jury.

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Nor does it lie with the parties, as it seems sometimes to have been supposed, to determine whether the issue or a specific question of fact shall be tried by a jury. It is true, that either party, if he desire a trial by jury, may within ten days after the cause is in readiness for trial, give notice of an application for that purpose. Upon the hearing of this application, the court may or may not direct that the issues in the action be tried by a jury. This will depend very much upon the probable course of the trial, and the nature of the questions to be decided. But if the application for a trial by jury be denied, or if no application be made, the court still has the power at the trial "to order the whole issue, or any specific question of fact involved therein, to be tried by a jury." Issues of fact in common law actions must be tried by a jury, unless the parties choose to waive this right. But it is for the court to say in *other cases*, whether an issue of fact shall be tried by a jury or by the court without a jury. I suppose it is the right of the court, in every case embraced in the 254th section of the Code, to have the aid of a jury upon the trial and to submit to its determination as many or as few of the questions of fact presented by the pleadings as it may deem expedient. I have in repeated instances, availed myself of this power at the circuit.

Entertaining this view of the power of the court upon the trial, it has not seemed to me to be a proper exercise of the discretion of the court, in ordinary cases, to instruct the court before which the case is to be tried, beforehand, what question it shall submit to a jury and what it shall not. It is better, I think, as a general rule, to leave the court which is to be charged with the conduct of the trial, to determine for itself the manner in which the questions of fact in the case shall be decided.

Nor have I been able to see that this case should be made an exception to this rule. It is true, that it involves a question of fraud. The gravamen of the complaint is, that the settlement which the plaintiff seeks to avoid was unfairly obtained. But, unless I have entirely misapprehended the effect

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of the pleadings, and the character of the issues to be tried, the determination of the action will involve the examination of very extensive transactions between the parties, covering a period of about eight years, and quite unsuited to a trial by jury. Under these circumstances, it is my duty to deny the motion, leaving it to the court, when the action is brought to trial, to determine for itself, whether it will submit any, and if any, what questions to the decision of a jury.

The costs of the motion should abide the event of the suit.

SUPREME COURT.

ANDREW VAN PELT, Appellant agt. MARTHA VAN PELT,
Respondent.

On an appeal from the decree of a surrogate, admitting or rejecting a will to probate, the supreme court have no inherent power to award costs, but must follow the directions of the statute in reference thereto.

Therefore, on appeal from a decision of the surrogate admitting a will to probate, followed by a reversal upon a question of fact, remitting the question at issue to a jury for a new trial, is but a single stage of the proceedings in the cause, and the court cannot *absolutely* award costs to the appellant, upon such reversal. The costs of the appellant in such case must depend upon the final determination of the question in controversy.

And where the appellant succeeds in reversing the decree of the surrogate upon a question of fact, but fails on a new trial to impeach the validity or execution of the will, he has no right to costs, but should pay costs to the respondent.

And where on appeal, the decision of the surrogate is affirmed, and where it is reversed upon a question of law, then the court shall award costs to be paid by the party failing, or out of the estate of the deceased, as the court shall direct. (2 R. S. 4th ed. §§ 19 and 20.)

Second District, General Term, 1858.

W. WATSON, *for the appellant.*

L. C. CLARK, *for the respondent.*

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By the court—BROWN, Justice. This was an appeal from the decree of the surrogate of the county of Richmond, establishing the will of Jacob Van Pelt, and admitting the same to probate. This court at the last February term, reversed the decree and awarded an issue to the circuit court of that county, to try the question of the validity and due execution of the proposed will. Mr. Justice DAVIES delivered the written opinion, which contained the direction that costs should be allowed to the appellant, to be paid out of the estate of the deceased in the event that he ultimately succeeded. The counsel for the appellant alleges, that Mr. Justice STRONG directed that the order should direct the recovery of costs by the appellant, out of the estate of the deceased absolutely, which was entered accordingly in the absence of and without the knowledge of the counsel for the respondent. Afterwards the issue awarded was duly tried at the circuit court, when the jury found against the appellant and in favor of the due execution and the validity of the will. The appellant now moves for leave to issue execution to collect from the estate of the deceased, the costs awarded to him by the order of reversal. And the counsel for the respondent also moves to amend and modify the order, so that it shall conform to the opinion of Mr. Justice DAVIES.

No laches can be imputed to the respondent in omitting to move to amend the order earlier. It was entered in her absence and without her knowledge. Notice of the motion was given for the May term. The cause was put on the non-enumerated calendar and not reached. There is no lack of diligence, for the motion was made and heard at the first opportunity.

The authority to award costs in a case of this kind, must be found in the statute, or it does not exist. The court has no inherent power to make such an award, but must follow the direction which the legislature have chosen to prescribe. An appeal from the decree of a surrogate, admitting a will to probate, followed by a reversal upon a question of fact, is but a single stage in the course of the proceedings. It remits the questions at issue to another tribunal for a new trial, when they

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will may be ultimately established or rejected according to the truth and the merits of the case. It would not, therefore, be in accordance with the usual course to award costs short of the final determination of the question in controversy. Section 71 of the act containing the general provisions applicable to wills of real and personal property, (2 *Rev. Stat.* 252, 4th edition,) directs that if the reversal of the surrogate's decree be founded upon a question of fact, the court shall order a feigned issue to be made up to try the questions arising upon the application to prove the will, and shall direct the same to be tried at the next circuit court, to be held in the county where the surrogate's decision was made. There is no provision whatever for costs at this stage of the proceedings. Of course none are given. Section 72 directs the manner in which the issues are to be tried. Sections 73 and 74 declare the effects and consequences of the determination upon the issues, whatever they may be, and the surrogate's duty thereupon. Section 75 declares that the costs and expenses of making up an issue and of the trial thereof, and all subsequent costs thereon, shall be paid by the party appealing, in case of his failure to impeach the validity or execution of the will. Such costs and expenses may be collected in a suit upon the bond, directed by the act to be given, which shall be prosecuted for that purpose whenever directed by the surrogate. Here it will be observed, there is no reference to the costs of the appeal to this court, but the costs given are those of making up the issue and of the trial thereof, and of all subsequent costs thereon. Section 76 provides for costs in cases where the appellant succeeds. In that event, the party who maintains the validity or the execution of the will may be required by the surrogate to pay the costs and expenses of the proceedings, either personally or out of the property of the deceased, and such payment may be enforced by attachment. Had the appellant succeeded finally, that is upon the question of the validity or due execution of the will, he would have been entitled to costs, as well those of the appeal to this court, as also of the trial and subsequent proceedings. He did succeed in reversing the decree of the

surrogate, but failed to impeach the validity or execution of the will, and therefore has no right to costs, but should pay costs to the respondent.

Thus far I have spoken only of those cases of appeal where the surrogate's decision is reversed upon a question of fact. Where the decision is affirmed and where it is reversed upon a question of law, then this court shall award costs to be paid by the party failing or out of the estate of the deceased, as the court shall direct. This is by virtue of another statute, (2 *Rev. Statutes*, 4th edition, 816, §§ 19 and 20.) This class of appeals from surrogate's decisions, are in fact cases *sui generis*, and the sections of the acts to which I have referred, having provided for the costs both when the appellant succeeds and when he fails, necessarily exclude the idea that costs are given and regulated by force of any other statute. It is well also to observe, that such appeals were formerly taken to the circuit judge of the circuit where the surrogate's decision was made, and not to the chancellor. And so the law remained until this court was substituted for the circuit judge, by virtue of the 17th section of the judiciary act of 1847. (*Sess. Laws of 1847*, 324.) They, therefore, did not fall within the provisions of the 85th section of the act concerning costs, (2 *Rev. Statutes*, 513, 2d edition,) as originally enacted.

The appellant's motion for leave to issue an execution is denied, and the respondent's motion to amend and modify the order of the general term is granted, without costs to either party.

In the matter of John Fitton.

SUPREME COURT.

In the matter of the *habeas corpus* for JOHN FITTON.

If there is any proceeding in the law which it is the duty of the courts to preserve and protect in its full power, it is the writ of *habeas corpus*; and whenever an attempt is made to violate or evade the provisions of the statute on this subject, the court should see that such attempt shall not succeed.

An officer of the Metropolitan police of the city of New-York, had in charge a prisoner on a writ of *habeas corpus*, and the officer made return to the writ that he had no opposition to the discharge, and had no further return to make thereon, whereupon the prisoner was discharged; and before leaving the court-room, without any warrant or process, the officer again arrested the prisoner, and carried him back to the same prison.

On an order for the officer to show cause why he should not be punished for contempt, he answered that he acted in pursuance of instructions and the order of one of the police commissioners, and supposed it was his duty as policeman, to obey the orders of such commissioner. And it appeared that the commissioner at the same time was attorney and counsel for a party complainant, who desired the re-arrest of the prisoner, on a charge of larceny.

Held, that the re-arrest was entirely unwarranted, and the propriety of such an order to the officer by the police commissioner, under the circumstances could not be conceded. But the circumstances in which the officer was placed by the positive instructions of his superior officer, led to the conclusion that he acted in obedience to such orders, and in ignorance of the consequences of his act, and was sufficient to relieve him from punishment.

New-York Special Term, July, 1858.

JOSEPH KEEFE was cited to show cause why he should not be punished for contempt in arresting Fitton after he was discharged on the return of the writ of *habeas corpus*.

W. P. JAMES, *attorney for Fitton.*

INGRAHAM, Justice.—Keefe made return to the writ, that he had no opposition to the discharge, and had no further return to make thereon, whereupon the prisoner was discharged, and before leaving the court-room, without any warrant or process, Keefe again arrested the prisoner, and carried him back to the same prison. If such a proceeding could be toler-

ated, the writ of *habeas corpus* would be of no avail, for as often as a man was declared to be illegally imprisoned, he could be arrested on another charge, and carried back to prison. If Keefe had any authority to make the arrest, he should have made it, and returned such authority as the cause of detention.

He had no authority to make the arrest, and from his affidavit which he has now filed in excuse of the act, he states that he acted in pursuance of instructions from General Nye, not to oppose the discharge, but as soon as he was discharged to arrest him on a charge of grand larceny. He also states, that he thought it was his duty as a policeman, to obey the orders of General Nye, and denies any intentional disobedience of the order of the court.

The affidavit of General Nye is also submitted by Mr. Keefe. In that affidavit General Nye states he is the attorney of Chester Moses, residing in Onondaga county, who was in partnership with the brother of the prisoner; that such brother absconded from that place and came to New-York; that it was ascertained that while here, he was closeted with the prisoner for two days; that after the brother had sailed for Europe, the prisoner went to Onondaga for his brother's family, where he was arrested. The prisoner was afterwards transferred to the custody of the sheriff of this city, and at the request of General Nye, was brought to his room, and there examined by him. In the course of the examination, the prisoner admitted the receipt of moneys from his brother, for which money General Nye obtained from him an order and on that order received the money. After the service of the writ of *habeas corpus*, General Nye appears to have had interviews with the attorney of the prisoner, and conversations took place between them as to the imprisonment of the prisoner and the money received from him. General Nye then instructed the officer to take the man to court, consent to his discharge, and to re-arrest him on a charge of larceny, and that he would appear and make complaint against him, and adds that he did not intend to have such re-arrest made in court.

The circumstances in which Keefe was placed by the posi-

In the matter of John Fitton.

tive instructions of his superior officer, are such as to lead me to the conclusion that he acted in obedience to such orders, and in ignorance of the consequences of his act. And I am therefore disposed on this occasion to suffer that act to pass without imposing the punishment which otherwise the conduct of the officer would deserve.

The subsequent arrest was entirely unwarranted. Fitton had been in prison for some time, and when the writ was allowed, was confined in the charge of Keefe, under the control of the deputy superintendent of the police, and of course of the police commissioners. The order as given by General Nye, *who at the same time was acting as attorney and counsel of Moses, the complainant*, was sufficient to excuse Keefe, although the propriety of such an order under the facts as stated by him, cannot be conceded. If the commissioners had any charge against the prisoner, it was but due to the proper administration of justice, and due to the prisoner, that such charge should have been returned to the court in answer to the writ, and if the cause was sufficient, the prisoner would have been remanded to the custody of the officer.

If there is any proceeding in the law which it is the duty of the courts to preserve and protect in its full power, it is the writ of *habeas corpus*, and whenever an attempt is made to violate or evade the provisions of the statute on this subject, the court should see that such attempts shall not succeed.

In this case, as Keefe has satisfied me that he acted under orders of a superior officer, and intended no disobedience of the orders of the court, I deem it unnecessary to make any further order in the matter.

The order to show cause is discharged.

SUPREME COURT.

DAVID MOULTON agt. INGHAM TOWNSEND.

Two of the plaintiff's witnesses, residents of the state of Iowa, came to Oneida county New-York, to attend the Oneida circuit, to be held on the 20th of October. The circuit, by a previous public notice, (but not in time to inform the witnesses of the fact,) adjourned on that day without doing any business, to the 10th of November following. On the 10th of November, these two witnesses, and also two other witnesses for plaintiff, residents of Floyd, Oneida county, attended the circuit, when the cause was set down for trial on the 17th of November. On the 17th, the four witnesses again attended and remained in attendance on the 17th, 18th and 19th, and on the 19th of November the circuit was adjourned to the 24th of November, and the witnesses returned to their places of residence in Oneida county, and again on the 24th of November the four witnesses attended the circuit, when the cause was tried.

Held, that the two witnesses from Iowa were entitled to witnesses' fees as follows: One *travelling fee* for each from the state line and back: to each, one day's constructive *attendance* on the 20th of October: and a *per diem* allowance for the whole period between the 10th and the 24th of November, deducting the days when the court was not actually in session.

To each of the Oneida county witnesses his *traveling fees* going from Floyd to Rome, (where the court was held,) and returning, three times: and their *per diem* allowance for attendance on the 10th, 17th, 18th, 19th and 24th of November.

Oneida Special Term, February, 1857.

THE plaintiff had a verdict at the Oneida circuit in November, 1856, and upon the taxation of his costs, the following facts appeared. The circuit was appointed to be held on the 20th of October, 1856, on which day, the presiding judge, without trying any causes, adjourned the circuit till the 10th of November, 1856. Public notice of the adjournment had been previously given. This cause was noticed by the plaintiff, and put upon the calendar for the circuit in October, and before he learned that the circuit was to be adjourned, the plaintiffs had requested one Pease and his wife, to come to this state from their residence in Iowa, for the purpose of testifying as witnesses on the trial; and he learned of the intended adjourn-

ment at too late a period to prevent their attendance in October. They accordingly reached their former residence in the town of Floyd, in season to attend on the 20th of October, and at the request of the plaintiff, remained at Floyd from that time to the 10th of November. On the 10th of November, Pease and his wife, with two witnesses named Robbins and Carrier, residents of the town of Floyd, attended the circuit at Rome, when this cause was by consent of counsel on both sides, set down for trial on the 17th of November, and all the witnesses returned to Floyd. On the 17th, Pease, his wife, Robbins and Carrier, again went from Floyd to Rome, and remained in attendance on the 17th, 18th and 19th, during which time the court was engaged in the trial of another cause. On the 19th of November, the circuit was adjourned to the 24th, and the witnesses returned to Floyd, and again attended at Rome on the 24th, when the cause was tried.

The plaintiff's counsel claimed that Pease and his wife were to be regarded as constructively in attendance upon the court from the 20th of October to the 24th of November, and that he was entitled to tax their per diem allowance for all that period, in addition to their travelling fees from the state line and back; or if this could not be allowed them, that they were to be considered as having returned home on the 20th of October, and come again to this state on the 10th of November, so that double travelling fees should be allowed them.

He also claimed that Robbins and Carrier were entitled to full travelling fees on each of the three occasions, when they went from Floyd to Rome and back, or if this charge was not allowed, that they were entitled to a per diem allowance for the whole period between the 10th and the 24th of November. Also, that in case neither of the claims for fees made in behalf of Mr. and Mrs. Pease was allowed, they were entitled to the same compensation as claimed for Robbins and Carrier.

The clerk, upon the objection of the defendant's counsel, disallowed all the charges for witnesses' fees, except one travelling fee for each of the witnesses Pease and his wife, from the state line and back; also one travelling fee for each of the wit-

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nesses Robbins and Carrier, from Floyd to Rome and back; and per diem allowance for attendance of each of the witnesses on the 10th, 17th, 18th, 19th and 24th of November.

The plaintiff moved for a retaxation, with instructions to the clerk to tax the fees as claimed by him.

M. H. THROOP, *for plaintiff.*

C. H. DOOLITTLE, *for defendant.*

BACON, Justice—Ordered a retaxation with the following directions to the clerk :

1st. The clerk's decision respecting the witnesses Pease and wife, was affirmed, except that he was directed to allow to them for one day's constructive attendance on the 20th of October, and a per diem allowance for the whole period between the 10th and the 24th of November, deducting the days when the court was not actually in session.

2d. To allow to each of the witnesses Robbins and Carrier, his travelling fees for going from Floyd to Rome, and returning three times, and their per diem allowance as the clerk had taxed it.

SUPREME COURT.

ELIZABETH E. SANDERS agt. JOHN LEAVY.

Where in an action to recover possession of real estate, the plaintiff in his complaint avers that he has the lawful title as the owner in fee simple to the property, and that the defendant is in possession of the said real estate, and unlawfully withholds possession of the same from the plaintiff. *Held*, sufficient, on demurrer. (*This agrees with Ensign agt. Sherman*, 14 How. 439.)

New-York Special Term, July, 1858.

. THE complaint of the plaintiff in this action shows : That

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the said plaintiff has the lawful title as the owner in fee simple to the following described real estate situate in the city of New-York, in the county and state of New-York to wit:

All that certain lot, piece or parcel of land, situate, lying and being in the city, county and state of New-York, on the north-erly side of Twenty-ninth street, and between Lexington avenue and Third avenue, bounded, described and containing as follows, viz.: (giving the boundaries.)

That the above named defendant is in possession of the said real estate, and unlawfully withholding possession of the same from the plaintiff. Wherefore the said plaintiff demands judgment that the said defendant may be adjudged to surrender possession of the said real estate, and to pay to the said plaintiff damages for the withholding of the same, and for the rents and profits thereof, to the sum of one thousand dollars.

The defendant in this action demurs to the complaint therein, and specifies as a ground of objection that it does not state facts sufficient to constitute a cause of action.

ALLAN MELVILLE, *for defendant*, argued the following points:

The sole ground of demurrer is, the complaint does not state facts sufficient to constitute a cause of action, because,

First. It is not alleged that the plaintiff or her grantor was ever in possession.

Second. It is not alleged that such possession was disturbed, and they were evicted by the defendant, his grantors or predecessors.

The allegation that the plaintiff has the lawful title as the owner in fee simple, is simply alleging a conclusion of law; and the allegation that the defendant is in possession and unlawfully withholding possession, is no more, as respects the words "unlawfully holding possession," there being no prior averment of facts to support the conclusion. The only allegation of fact in the whole complaint is, that the defendant is in possession and withholds the same from the plaintiff. It therefore follows, that all the facts which the complaint avers may

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be true, and yet the plaintiff not have a shadow of right to the judgment which he demands. (See *Lawrence agt. Wright*, 2 *Duer*, 678.)

So far the sufficiency of the complaint is tested by the Code, which requires that the complaint in all actions shall state facts. By it the plaintiff shows no title or interest in the land, nor that she was ever in possession of the property, nor that the defendant ever entered or disturbed her possession. By the 455th section of the Code, "the general provisions of the Revised Statutes, relating to actions concerning real property, shall apply to actions brought under this act, according to the subject matter of the action, and without regard to its form." The language of this section has been held to be sufficiently broad to retain the mode of pleading prescribed by 2 *R. S.* 304, §§ 7, 8, 9 and 10, *marginal paging*. (Warren agt. *Nelligar*, 12 *How.* 403.)

In case of *Ensign agt. Sherman*, decided by Justice EMOTT, (13 *How.* 35,) the complaint is precisely similar to that in this case, and a demurrer interposed, was sustained in a learned opinion, showing a full examination of the question, in which the judge states, that on the argument he was strongly inclined against the demurrer. Opposed to the case decided by Justice EMOTT, is the case of *Waller agt. Lockwood*, before general term, sixth district, October, 1856, Judges SHANKLAND, MASON, GRAY and BALCOM. But the question does not seem to have undergone a very full discussion. Judge BALCOM delivered the opinion of the court, and the complaint is precisely similar to the one in this action now before the court. The complaint is sustained after reference to the case decided by HARRIS, Justice, and the case in 2 *Duer*, but no reasons are given in support of the complaint. The court hold that it is sufficient to entitle the plaintiff to recover, contenting itself by stating that the form of the complaint need not be like declarations in ejectment under the Revised Statutes; that it must state facts instead of fiction, and its sufficiency must be tested by the Code, and not by the Revised Statutes. But it seems to have failed to apply the test of the

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Code so laid down, to the complaint before it, which will not stand the test. The decision is of no other authority than one in which it is held that the form prescribed by the Revised Statutes, does not apply. Again; the Code provides that actions shall be prosecuted in the name of the real party. (*Section 12.*) How does it appear that this action was prosecuted in the name of the real party in interest? A statement in a complaint, of the facts constituting a cause of action must embrace the plaintiff's title, or in other words, his right of action against the defendant. (*Parker agt. Totten, 10 How. 233.*)

Does anything appear on the face of the complaint, to show that the plaintiff has a right to maintain the action against the defendant? The complaint alleges, that the plaintiff has the lawful title as the owner in fee simple, to the premises in question, which is simply merely alleging a conclusion of law, in the absence of any statement that she was ever in possession. The plaintiff's interest in the land is an essential fact to be proved, and not being avowed either expressly or by necessary implication, the complaint is defective for this reason alone, because, under the Code, if it appears that the plaintiff is not the real party in interest, it is a bar to the action and no further defence is necessary. (*James agt. Chalmers, 2 Seld. 215.*) Section 160 of the Code does not apply where the whole pleading is defective, but only where it is defective in part. An issue of law can only arise upon a demurrer. (*Code, 249; Id. 144.*)

H. P. TOWNSEND, *for plaintiff*, argued the following points:

"In an action under the Code, to recover the possession of real estate, the complaint is sufficient if it states that the plaintiff has the lawful title as the owner in fee simple, to the premises described therein, and that the defendant is in possession of the premises, and unlawfully withholds possession of the same from the plaintiff, and that the plaintiff demands that the defendant may be adjudged to surrender the possession to him, and to pay damages for the unlawful withholding of the

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same, &c." (*Walter agt. Lockwood*, 23 *Barbour's Supreme Court Reports*, 228; *overruling Lawrence agt. Wright*, 2 *Duer*, 673.)

The allegation of the plaintiff's having the legal title, implies the allegation that the plaintiff has been possessed of the premises within the time required by law. "The person establishing a legal title to the premises, shall be presumed to have been possessed thereof within the time required by law, and the occupation by another shall be deemed to have been under or in subordination to the legal title." (*Code*, § 81; *Graham's Practice*, page 76.)

It is not necessary to allege in pleading more than the fact to be proved. The evidence by which the fact might be proved, need not be set out in the pleading.

INGRAHAM, Justice. I think the complaint in this case is sufficient. To recover real estate, what is it necessary for the plaintiff to prove? Two things: first, that he is the owner of the property; secondly, that the defendant withholds from him the possession without right. Both facts are plainly averred in the complaint. The demurrer admits both to be true, and with such an admission made on the trial, could any court refuse to give judgment?

If the defendant's views are right, the plaintiff could be compelled to set out the evidence on which he relies to prove his complaint, and then he would be liable to a motion to strike such allegations from the complaint. If there was any doubt on this point, the decisions of the general term in the second district, in *Ensign agt. Sherman*, (14 *How.* 439,) of the sixth district in *Walter agt. Lockwood*, (23 *Barb.* 228,) are directly in point.

Judgment for the plaintiff on demurrer, with leave to defendant to answer on payment of costs.

SUPREME COURT.

ISAAC K. GORHAM agt. THOMAS C. RIPLEY and others, Executors, &c.

By the statute, (2 R. S. 88, § 36,) in regard to a reference of claims against executors and administrators, whereby they are authorized "to enter into an agreement in writing, with the claimant, to refer the matter in controversy to three disinterested persons, to be approved by the surrogate," it was intended that the parties should *mutually agree* in writing, to refer the claim, and in case they should fail to select referees for themselves, that the selection should be made by the surrogate.

It is not a sufficient compliance with the statute for the executors to offer to refer the claim to three referees named by themselves. If such a proposition is rejected, and it is proposed by the claimant that the parties appear before the surrogate, for the purpose of having referees selected, it is the duty of the executors to accept such offer, to save them from the payment of costs.

Albany Special Term, August, 1857.

MOTION for costs against the defendants as executors.

The action was brought upon two promissory notes alleged to have been made by the defendants' testator. Before the suit was brought, the plaintiff presented his demand duly verified to the defendants, and demanded payment, which was refused. He then offered to refer the claim to three disinterested persons, to be approved by the surrogate, as provided by law. In reply to this offer, the defendants delivered to the plaintiff a stipulation in writing, whereby they offered and agreed to refer the claim to John Banker, Ephraim Ogden and Job Andrews, three impartial and disinterested persons, to be approved of by the surrogate. The plaintiff declined to refer the claim to the persons named, but served upon the defendants a notice wherein he renewed his offer to refer the claim according to the statute in such case provided, and to appear before the surrogate at such reasonable time as the defendants might name, to have the reference agreed upon and perfected. The defendants were further notified that their omission to ap-

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point a time for meeting before the surrogate, would be regarded as a refusal to refer. No reply was made to this notice by the defendants. An action having been brought upon the demand, and issue having been joined, the cause was tried at the Rensselaer circuit in June, 1857, and resulted in a verdict in favor of the plaintiff, for the full amount of his claim. The plaintiff moved for costs against the defendants, both upon the ground that the payment of his demand had been unreasonably resisted, and also that the defendants had refused to refer the same, pursuant to statute.

W. A. BEACH, *for plaintiff.*

H. N. WALES, *for defendants.*

HARRIS, Justice. The claim for costs on the ground that the demand was unreasonably resisted, has been successfully defended. The circumstances shown by the defendants in opposition to this motion were abundantly sufficient to justify them in refusing to pay the plaintiff's demand. But I think the defendants must be deemed to have refused to refer the claim, pursuant to the provisions of the statute. They were authorized "to enter into an agreement in writing, with the claimant, to refer the matter in controversy to three disinterested persons to be approved by the surrogate," (2 R. S. 88, § 36.) The language of this provision is not very explicit, but I think it was intended that the parties should mutually agree in writing, to refer the claim, and in case they should fail to select referees for themselves, that the selection should be made by the surrogate. It cannot be, that it is a sufficient compliance with the statute, for the executors to offer to refer the claim to three referees named by themselves. When this proposition was rejected, and it was proposed that the parties should appear before the surrogate for the purpose of having referees selected, it was the duty of the defendants to have accepted the offer. Their omission to do so, has rendered them liable for costs. The motion, therefore, must be granted.

SUPREME COURT.

FRANCES NORSWORTHY and others agt. MARY N. BERGH and others.

Under the statute of 1855, (*Sess. Laws of 1855, ch. 327.*) in which authority is given to the court to order a sale of real estate or a portion thereof, in order to pay off the assessments and taxes imposed thereon, the only cases in which the court can order such sale, is, where the real estate or any part of it has been sold, or where it shall thereafter be sold, or where it is or shall become liable, in case of default, to be sold to satisfy a tax or assessment.

The statute does not apply to cases where the taxes and assessments have been paid and the land discharged therefrom, and it is sought by an application to the court for a sale to *reimburse* the parties who have made such payments.

The *constitutionality* of this act cannot be questioned successfully; besides, the court of appeals have settled that question by an express adjudication, in the case of *Jackson agt. Calder*, (*MS., opinion, 1857.*) *per* JOHNSON, J.

And the sale which the court is authorized to order, is confined to the real estate within the *city or village* where the real estate is, which is assessed, either in whole or in part, and no authority is given to sell any property out of the city or village, which is not assessed.

Where the assessments mostly were made on unimproved property, and as to the productive property, they were for purposes which conferred quite as much benefit on the future estate as on the present life estate, it was ordered that so much of the property as was required therefor be sold, and the proceeds be applied to the payment of the assessments and the costs of suit, with a reference to inquire and report what amount was necessary, &c.

New-York Special Term, July, 1858.

THE plaintiffs having life interests in part of the property devised by Samuel Norsworthy, deceased, have brought this action to obtain a judgment directing a portion of such real estate to be sold, in order to pay off and discharge various assessments now laid upon the property, and for which they allege the property will be sold, if not soon redeemed therefrom by payment. They also ask to have a portion of the property sold in order to reimburse the plaintiffs various sums of money which they have heretofore paid for assessments upon the property prior to the commencement of this action.

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WAKEMAN & LATTING, *for plaintiffs.*

TOMLINSON & WALDEN, *for infant defendants, H. Humphreys and H. Humphreys, Jr.*

Points for guardian of infant defendant, H. Humphreys.

I. The court has not jurisdiction to compel the sale of real estate. The acts of 1841 and 1855, so far as they authorize a sale, are void. (*Laws of 1841, ch. 841; 1855, ch. 327; Powers agt. Bergen, 2 Seld. 358; Taylor agt. Porter, 4 Hill, 140.*)

II. If the acts are valid as a constitutional exercise of the power of the legislature, they constitute the only authority of the court, and the court cannot authorize a sale in a case not authorized by the act. (*Rogers agt. Dill, 6 Hill, 415.*)

The act of 1855 is a substitute for the act of 1841, and repeals it, except so far as it is preserved by special enactment. (*Powers agt. Barr, 24 Barb. S. C. 142; per BIRDSEYE, Justice.*)

1st. The act only applies to cases of persons holding equal estates. (*Laws of 1855, p. 537, § 1.*)

2d. It is a means by which the assessment may be apportioned among them.

3d. The property to be sold by the judgment of the court must have been either sold, or be liable to be sold, for some assessment imposed.

Therefore the court cannot order either.

1st. The sale of any property not liable to assessment; or

2d. Order a sale of any property to reimburse those who have already paid the assessment.

III. As to, on whom, and what estates the burden should rest.

1. The will devises the real estate to the testator's children for life, with remainder in fee to the grandchildren; the personal estate is given to the children, with the rents of the realty. It is manifest from the will that the testator intended that the rents, &c., of his real estate, with the personal estate, should be applied to the preservation of the estate, and

that the property should go in the manner devised. To carry out that intent, the personal property should be applied to the preservation of the real estate. (*See Hepburn agt. Hepburn*, 2 *Bradford's Sur. R.* 74, 76.)

Where an assessment goes to the permanent benefit, it may be right to apportion it between tenant for life and remainderman, but not to throw all upon the tenant for life. (*Cairns agt. Chabert*, 3 *Edw.* 312.)

Points for infant defendant, H. Humphreys, Jr.

I. The will devises the real estate to the testator's children for life, with the fee in reversion to the grandchildren. It is manifest from the whole tenor of the will, from all its provisions, bequests and devises, that the testator intended that his personal estate, or the income of his real estate, should be applied to the preservation of the estate, and save it from destruction. To this end he gives the personal property with the real estate to his children for life. Such being the intention, a sale will not be ordered contrary to it. (*Rogers agt. Dill*, 6 *Hill*, 415, &c., and cases cited.)

II. Although as a general rule, the reversions must pay the assessments, and the life estate the interest thereon, still where under the will the income is to be applied to protect the estate, it must be first exhausted to pay assessments before a sale can be ordered, and so where real and personal estate are mingled. (*Hepburn agt. Hepburn*, 2 *Bradf. R.* 74; *Parkinson agt. Parkinson*, *id.* 77, 79.)

III. This court has no power to order a sale of the estate of an infant, except so far as they are authorized by statute. (*Rogers agt. Dill*, 6 *Hill*, 415.)

IV. The acts of 1841, 1842 and 1855, only authorize a sale to pay taxes or assessments, or to redeem the same. If it be sufficient to authorize the court to sell the infant's estate to pay these assessments, it does not authorize a sale to reimburse the life tenants for any payments made by them. Neither will it authorize a sale of any property not liable for the assess-

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ment to relieve others. (*Powers agt. Barr*, 24 Barb. S. C. R. 142.)

The guardian *ad litem*, asks for an allowance, whatever be the decision of the court.

INGRAHAM, Justice. In regard to the latter object of this action, viz., the sale of property to reimburse the plaintiffs for moneys paid by them for assessments heretofore laid upon the property, it is sufficient to say that no authority to order such sale has been conferred by the statute. Before the act of 1841 was passed, no authority existed by which property held by tenants for life and remaindermen, could be sold to apportion the assessments between them. The act of 1841, was intended to remedy what was then an oppressive rule to those holding the life estate, as on unimproved property, the payment of assessments in many instances, would exceed the whole value of the life estate. It was for the purpose of remedying this evil, that the various statutes of 1841, 1842 and 1855, were passed. As the latter one has incorporated in it all the provisions of the other applicable to this question, I shall confine myself to the examination of the provisions of that act.

That act specially enumerates the various cases in which its aid may be invoked, and as it is a statute interfering with the title of individuals to their property, and in fact providing for the sale of it, and the disposition of the proceeds, without their consent, it should not be extended by implication beyond the cases expressly designated therein. The statute in its operation is confined to the following cases. By the first section of the act, (*Session Laws of 1855, ch. 327*,) the proceeding is allowed *where the real estate or any part of it has been sold, or where it shall thereafter be sold, or where it is or shall become liable in case of default, to be sold to satisfy a tax or assessment.*

These are the only cases in which authority is given to the court to order a sale of the property. The land upon which the plaintiffs have paid the assessments, is not in this condition, no part of it has been sold for assessments, nor is it liable to be sold to satisfy the same. The assessments have been

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paid, the land discharged therefrom, and the plaintiffs, if they have any claim against the defendants, which is by no means clear, can only enforce it by an action against them personally. Different questions present themselves as to the other branch of this case.

It is objected that the act under which this proceeding is taken is unconstitutional, that such a statute alters the disposition of the estate as made by the testator, and that the rights of the infants should be protected against the claim of the tenants for life. The constitutionality of the act can hardly, I think, be questioned successfully. Its provisions are akin to those statutes which allow the interests of infants and others who are incapable of acting for themselves, to be sold to protect those interests. It is not uncommon to order the sale of real estate of infants and other persons, unable to act for themselves, to prevent the sale of such property for taxes or assessments, or where in any case the interest of the party will be advanced thereby. The case of *Taylor agt. Porter*, (4 *Hill*, 140,) was referred to upon the argument, as an authority to show that the property of an individual could not be taken for the private purposes of another. But such is not the question in this case. Here the property is subject to an assessment, for which the interest of all the owners in it may be sold. The unimproved property, if sold for the assessment, would be lost to the owners for a term of years, much longer than the life estate. The operation of the statute is to protect all the owners. The sale affects all equally, and the appropriation of the proceeds is to be by an equitable apportionment between the several owners in proportion to their estates therein.

In *Powers agt. Bergen*, (2 *Selden*, 358,) Justice JEWETT referring to the act of 1841, says: "This act confers upon the court of chancery all necessary power to adjust contributions to the payment of assessments among the parties interested in the lands on which the assessments are imposed." And in *Jackson agt. Calder*, (*MS. opinion*, 1857,) the court of appeals have sustained the constitutionality of this act by an express adjudication. In that case, Justice JOHNSON says, "that such

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a provision should be made, is as evident in this case as it is in partition. The tax or assessment is a lien on the land, and under that lien a term for years may be created, so long as completely to cut off the practical enjoyment of any estate in the land for many generations. And again, the power which the legislature exercised in passing this act, is a statutory power when exercised under due restrictions, and its existence cannot be questioned." The question as to the constitutionality of the act, may be considered as disposed of, by this decision of the court of appeals.

There is more difficulty in disposing of the other questions which arise, as to the property which should be sold. The plaintiffs have suggested the sale of unproductive land in the interior of the state, but such property cannot, in my judgment, be ordered to be sold for this purpose. It may be that the interests of all would be promoted by such sale. Undoubtedly the interests of the tenants for life would be, as they would then be realizing interest from what now produces nothing. The statute, however, does not authorize such sale. The authority is given where several persons are interested in *any real estate situate within the bounds of any city or village in this state*, and such real estate or any part of it has been assessed, &c., the court shall have power to order a sale of such real estate, or any part or parts thereof.

The sale is confined to a portion of the real estate within the city or village where the real estate is which is assessed, either in whole or in part, and it confers no authority to sell any property out of the city or village, which is not assessed. The power to sell, in the present case, can only be exercised in regard to property in the city of New-York, where the assessments have been imposed.

It does not, however, follow, that because there are cases where such a sale is proper, that the court in all cases would order a sale, as they are to make an equitable apportionment of the amount among the several owners. Thus for example, an annual tax upon productive property, should not be apportioned in whole or in part to any owner, except the one hold-

ing the life estate. An assessment for a temporary purpose, could not equitably be charged upon the remainderman ; all assessments not benefiting the reversion, should not be charged upon the residuary estate except where the property is unproductive.

In this case, the assessments mostly are on unimproved property, and as to the productive property, they are for purposes which confer quite as much benefit on the future estate as on the present life estate, being for the opening of streets, building of sewers, curb and paving, and similar charges ; and the referee has reported that all the improvements for which such assessments were made, were permanently beneficial to the inheritance.

Judgment must be ordered for the plaintiffs, directing so much of the property in the city of New-York as is requisite therefor to be sold, and that the proceeds be applied to the payment of the assessments and the costs of this suit. That it be referred to Mr. Ruggles, the former referee, to inquire and report what amount is requisite to discharge and pay the assessments and costs ; what property it is most for the interests of the several parties should be sold, and in deciding thereon, that he take into consideration what portion of the assessments should be borne by the parties having different interests in the property assessed, so that the parties holding the life estates, shall have their portion of the assessments, and not have them charged entirely on the unproductive property ; and all further directions are reserved until the coming in of such report.

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SUPREME COURT.

SAMUEL DIAS, Respondent agt. PATRICK J. SHORT, Appellant.

In actions of *slander* the rule formerly was, that when the words required a knowledge of extrinsic facts, either to show their meaning or their applicability to the plaintiff, all such facts must be both averred and proved. The only change made by the Code in this respect, is to dispense with such averments of extrinsic facts, showing the *applicability* of the slander to the plaintiff.

It is still necessary, as it formerly was, to aver and prove any facts necessary to explain the meaning of the words used. It is also necessary, of course, to allege that the words were spoken of and concerning the plaintiff.

Where the objection taken at the trial, is for the want of a material averment which the plaintiff must prove in order to sustain his action, unless the judge permits an amendment on the spot, the objection is as fatal as it would be on demurrer.

But where the objection first taken on the trial is for the want of an innuendo, stating the meaning of the words, and this question is fairly left to the jury, and they find them slanderous, the court ought not, after the verdict, to interfere. The verdict aids the defect, even if the want of such an averment would have been good cause of demurrer.

And it is well settled that the meaning of the words used by the defendant, cannot be proved by the *opinions* of witnesses, or their statement as to how they understood them.

In this case, the plaintiff was charged to have been a "receiver of stolen goods," which words were considered actionable *per se*. But a charge that "he had received stolen goods," would not have been considered actionable *per se*, without the additional allegation that he knew they had been stolen. *Per* S. B. STRONG, Justice.

Dutchess' General Term, May, 1858.

Before, STRONG, LOTT and EMOTT, Justices.

APPEAL from city court of Brooklyn.

MR. GARRISON, *for appellant.*

MR. GILBERT, *for respondent.*

By the court—EMOTT, Justice. If the words uttered by the defendant, imputed to the plaintiff feloniously receiving

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stolen goods, with a guilty knowledge of the theft, they are actionable *per se*. Whether they did so, was a proper question for the jury under proper instructions, and upon a suitable state of pleadings. I see no objection to the instructions on this point, given to the jury in the court below. The main question is, whether the complaint was so defective as not to state any cause of action in the uttering these words? The rule is, that words are to be taken in the sense in which they are generally used, and would be naturally understood. (*Roberts agt. Camden*, 9 *East*, 98.) When the words require a knowledge of extrinsic facts, either to show their meaning or their applicability to the plaintiff, the rule formerly was, that all such facts must be both averred in pleading and proved. (See *Miller agt. Maxwell*, 16 *Wend.* 9.) The only change made by the Code in this respect, is to dispense with such averments of extrinsic facts, showing the applicability of the slander to the plaintiff. (*Code*, § 164; 5 *How.* 171; 6 *id.* 99.) It is still necessary as it formerly was, to aver and prove any facts necessary to explain the meaning of the words used. It is also necessary, of course, to allege that the words were spoken of and concerning the plaintiff.

In the case at bar the complaint contains a colloquium, alleging that the slanderous words were spoken of the plaintiff, and there cannot be said to be any extrinsic facts which if proved would aid in understanding or explaining the words. The most which can be contended for the defendant is, that the words stated in the complaint and proved by the witnesses, do not distinctly imply a charge of receiving goods *knowing them to be stolen*, so that the complaint merely stating their publication concerning the plaintiff, in the language of Baron ALEXANDER, in *Hall agt. Blandy*, (1 *Younge & Jer.* 488,) might spread one entire and distinctly slanderous charge on the record. Obviously, however, all that was needed to make this complaint full and perfect, even to such a requirement, was an innuendo stating the meaning of these words to be a charge of guilty reception of stolen property. If the objection had been taken by demurrer, perhaps it might have been fatal; but I

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think when such an objection is first taken at the trial, and then the question of the meaning of the words is fairly left to the jury, and they find them slanderous, we ought not after the verdict to interfere. This strikes me as being very clear, because the innuendo for which the objection calls, if it had been in its proper place in the complaint, would not have required or admitted any evidence to sustain it.

Where the objection taken at the trial is for the want of a material averment, which the plaintiff must prove in order to sustain his action, unless the judge permits an amendment on the spot, the objection is as fatal as it would be on demurrer. But it is well settled in our courts, that the meaning of the words used by the defendant cannot be proved by the opinions of witnesses, or their statement as to how they understood them. (*Gibson agt. Williams*, 4 *Wend.* 320.) Although the meaning of the words and their application are questions for the jury on the evidence. (*Vide S. C., and Van Vechten agt. Hopkins*, 5 *J. R.* 211.) Yet it must be upon proper evidence, that is, upon proof of facts only. The words alleged here, are not cant or slang phrases, or words used in a sense peculiar to any class of people, and, therefore, requiring an averment of their cant meaning, or the sense in which any classes of persons used them. There was nothing, therefore, in which this complaint is deficient, which would have permitted any additional evidence, and there was no evidence admitted on the trial, which required any additional statements in the complaint to justify it. A judgment should not be reversed under such circumstances, after a verdict, for the want of a merely formal averment in the pleading. The verdict aids the defect, even if the want of such an averment would have been good cause of demurrer.

This court has held, however, in *Ensign agt. Sherman*, (14 *How.* 439,) that mere formalities in pleading, that is, allegations requiring no proof, are abolished by the Code, and their absence does not even make a pleading demurrable. I think the principle applied in that decision is sound, and although it reversed my opinion at special term, I yielded to my breth-

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ren upon the question of its applicability to that case, where as here, it was a question of statement and not of proof. That, however, was upon special demurrer; the case at bar is strengthened, as I have already said, by a verdict affirming the slanderous meaning of the words for which this suit is brought, and thus supplying the want of an innuendo stating such a sense in the complaint.

The judgment should be affirmed.

LOTT, Justice, concurred.

S. B. STRONG, Justice. I concur in this opinion. The charge made by the defendant against the plaintiff, was not simply that he had received stolen goods. If it had been, I should think that it would not have been actionable *per se*, without the additional allegation that he knew that they had been stolen. But the plaintiff was charged to have been "a receiver of stolen goods." That implies a habit of receiving such goods, and conveys a meaning, as it is generally understood, that the receiver encouraged such thefts, and knew that they had been committed when he received the goods.

The judgment should be affirmed.

SUPREME COURT.

HENRY C. BOWERS agt. TALLMADGE and HEWETT.

In an action to stay proceedings on a judgment against three defendants, brought by one of said defendants, against the plaintiff in the first suit, and a general assignee of the said three defendants, on demurrer,

Held, that there was a defect of parties. The other two defendants in the first judgment should have been made parties, either plaintiffs or defendants.

Such an action, however, cannot be sustained, because the plaintiff can have all the relief he is entitled to, on motion in the original suit. It is out of place to bring an action to stay another action in the same court, where by a simple motion the matter can be easily heard and disposed of in the original action.

Bowers agt. Tallmadge.

New-York Special Term, July, 1858.

THIS action was brought by the plaintiff against the defendants for the purpose of having a certain judgment declared void as against the plaintiff. The plaintiff demanded judgment as follows: "The plaintiff demands judgment in this action, that the judgment entered in the aforesaid action in which Henry B. Hewett was plaintiff, and John J. Tallmadge, Henry C. Bowers and Ralph L. Howell, were defendants, on or about the 27th day of October, 1856, for the sum of \$493.38, shall be ordered by a judgment of this court to be satisfied or vacated of record, and that the same be adjudged irregular, fraudulent and void, as against the plaintiff in this action, and one of the defendants in said action." Proceedings supplementary to execution had been taken upon this judgment against the defendant Henry C. Bowers, the plaintiff in this action. And an injunction was asked to restrain such proceedings. It was also alleged that Samuel W. Tallmadge was the general assignee of the defendants John J. Tallmadge, Henry C. Bowers and Ralph L. Howell, the defendants in said judgment.

The defendant Tallmadge, demurred to the complaint, and assigned as causes of demurrer: "1st. That there is another action pending between the same parties for the same cause. 2d. That there is a defect of parties plaintiff in that Ralph L. Howell and John J. Tallmadge, are not made parties plaintiff or defendant. 3d. That there is a defect of parties defendants, in that this defendant, Samuel W. Tallmadge, is improperly made a party to this action. 4th. That the complaint does not state facts sufficient to constitute a cause of action, (among other respects,) in that it is not alleged that the judgment mentioned in the complaint, has ever been paid or satisfied, or that it is not justly due; and also in that no action will now lie in this court to vacate or satisfy a judgment recovered in another action in said court, or to restrain proceedings therein."

LEARNED, WILSON & COOK, *for defendants.*

WM. C. HORNFAGER, *for plaintiff.*

O'Callaghan agt. Carroll.

INGRAHAM, Justice. The objection that there is a defect of parties is, I think, well taken. There were three defendants in the former suit, and judgment recovered against them. One of these defendants brings this action to stay proceedings on that judgment. The other defendants in the original suit are not made parties here, either plaintiffs or defendants. They are necessarily interested in the matter. If they are unwilling to join as plaintiffs, they should be made defendants. (*Code*, §§ 118, 119 and 122.)

I think also, that an action of this kind should not be sustained. The plaintiff can have all the relief he is entitled to on motion in the original suit, more expeditiously and in a mode more consistent with the proper administration of justice. It seems to be very much out of place to bring an action to stay another action in the same court, where by a simple motion the matter can be easily heard and disposed of in the original action. Such a multiplication of actions should not be encouraged. (4 *How. Pr. Rep.* 350; 8 *How. Pr. Rep.* 416.)

Judgment for defendant on demurrer.

SUPREME COURT.

JAMES O'CALLAGHAN agt. MARGARET CARROLL.

Where an appeal is taken from a judgment of a justice of the peace, to the county court, and the county court, as it is authorized to do by the 13th subdivision of § 30 of the Code, (in cases where the county judge is disqualified from hearing the appeal,) transfers the action to the supreme court, the appellant on the reversal of the judgment is entitled to the same costs only as if the reversal had been rendered by the county court, to wit: \$15, together with the fees of officers, and disbursements.

The allowance for costs on appeal, provided by the 5th subdivision of the 307th section of the Code, is only applicable to appeals to the supreme court. An appeal above mentioned is not made to the supreme court, but to the county court, and is by operation of law transferred to the supreme court.

Albany Special Term, October, 1857.

COSTS on appeal. The plaintiff recovered a judgment against the defendant in the Troy justices' court, for one hundred dollars, besides costs. The defendant appealed to the county court of Rensselaer county. The county judge being disqualified from hearing the appeal, the case was transferred to the supreme court, in the manner prescribed in the 13th subdivision of the 30th section of the Code.

The appeal having been argued before the supreme court the judgment of the justices' court was reversed. Upon the taxation of the costs upon such reversal, the attorney for the appellant claimed to be allowed \$15 for proceedings before argument, and \$30 for the argument, besides \$10 for a calendar fee, at a term when the cause was not reached. The clerk disallowed these items, and allowed \$15 for the costs upon the reversal, together with disbursements. From this taxation the defendant appealed.

R. A. PARMENTER, *for plaintiff.*

C. W. ROOT, *for defendant.*

HARRIS, Justice. The appeal was to the county court, as required by the 352d section of the Code. There was no other appeal in the case. The county court, as it was authorized to do by the 13th subdivision of the 30th section of the Code, transferred the action to this court, which thereby, and not by virtue of any appeal, acquired jurisdiction of the action.

The 371st section of the Code, authorizes an allowance to the appellant, upon the reversal of a judgment on appeal from a justices' court to the county court, of fifteen dollars, together with the fees of officers and disbursements. This was such an appeal. It was not the less so, because by operation of law, it was transferred to, and the judgment of reversal was rendered by this court. The allowance provided by the 5th subdivision of the 307th section of the Code, is only applicable to appeals to this court. In this case there was no such appeal, and there being none, the defendant was not entitled to have

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her costs taxed under this provision. (*See Taylor agt. Seeley, 4 How. 314.*) There was no error in the taxation, and the motion should therefore be denied, but without costs.

SUPREME COURT.

NOAH WATERBURY, Respondent agt. W. ANN SINCLAIR
and GEORGE SINCLAIR, impleaded, &c.

This action was brought upon a promissory note made by D. payable to W., (the plaintiff) or his order, three months after date, for an alleged present indebtedness in part, and in part for prospective rent. It was indorsed in blank by S., acceding to and knowing the purpose for which the note was made, before it was delivered to the plaintiff.

Held, on a review of all the principal cases upon this question, that the only way in which the plaintiff could make the note available to himself against the indorser, would be by indorsing it to the defendant S. without recourse, and then taking the defendant S.'s indorsement as the source of his title, as well as the foundation of his rights.

Also *held*, that the complaint was defective in not alleging such a transfer. It did not show the defendant S. to have indorsed the note at all in a legal sense, and the plaintiff must get an indorsement, and not rely on parol proof of a contract, or he could not recover under the present doctrines of the courts. The defendant S. could not be charged as maker or guarantor.

This decision reversed that at special term, where it was held by S. B. STRONG, Justice, that no indorsement by the payee (plaintiff) was necessary, in order to perfect his right. His rights whatever they were, accrued when the note was delivered to and accepted by him, and were in no manner dependent upon any additional indorsement; that the rule that the payee must first indorse the note, is founded upon the fact that he alone can transfer it; and that when, as in this case, there was no transfer, the reason of the rule failed.

Kings General Term, February, 1858.

Present, S. B. STRONG, LOTT and EMOTT, Justices.

THE complaint of the above named plaintiff respectfully shows to this court:

That on the 9th day of November, in the year 1855, the de-

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defendant George Dick was justly indebted to this plaintiff in the sum of three hundred and eight dollars and forty-two cents, for rent of certain premises in the city of Brooklyn, before that time let and rented to said defendant Dick, by this plaintiff, and for a certain promissory note made by said Dick, and delivered to this plaintiff, which was then past due and held by said plaintiff. That for the purpose of securing the said indebtedness, and also the further sum of one hundred dollars, which would accrue and become due from said defendant Dick, to this plaintiff, on the first day of February then next, for the rent of said premises above mentioned, and in consideration of the forbearance of the day of payment of said indebtedness by this plaintiff, and as an inducement for said plaintiff to allow said Dick to remain in possession of said premises, said Dick agreed to make and deliver to this plaintiff his promissory note in writing, indorsed and guarantied to this plaintiff by the defendant William Ann Sinclair, then a *feme sole*, and known by the name of William Ann Lawson, payable three months thereafter, for the sum of four hundred and thirteen dollars and eighty-two cents, being the amount of said indebtedness, with three months' interest, and the said rent of said premises; and the said defendant William Ann Lawson, with a full knowledge of all the facts above stated, and for the same consideration, agreed to indorse and guaranty said note to this plaintiff.

That thereupon, in pursuance of said agreement, and for the consideration aforesaid, the said George Dick, on the said ninth day of November, in the year 1855, made his promissory note in writing, bearing date on that day, whereby for value received, he promised to pay, three months after the date thereof, to this plaintiff, or his order, the said sum of four hundred and thirteen dollars and eighty-two cents, for value received, at No. 190 Pearl street, in the city of Brooklyn; and the said defendant William Ann Sinclair, indorsed the same by the name of "W. A. Lawson," and the same was afterwards duly delivered to this plaintiff, who thereupon became, and ever since has been, and now is, the sole owner and holder thereof.

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That said defendant Dick remained in possession of said premises until after the said sum of one hundred dollars became due for rent. That on the day whereon the said note became due and payable, the same was duly presented for payment at the place therein designated, and payment thereof was duly demanded which was refused, whereupon said note was duly protested for non-payment, and due notice of such non-payment and protest was on the same day given to said defendant William Ann Lawson.

That since the said note became due, and as this plaintiff is informed and believes, some time during the year 1857, the said defendant William Ann Lawson, intermarried with the defendant George Sinclair, and is now the wife of said George Sinclair.

That no part of the sum secured by said note has been paid to this plaintiff, or to any person for his use, and that the said defendants are justly indebted to this plaintiff on account thereof, in the sum of four hundred and thirteen dollars and eighty-two cents, and also in the further sum of seventy-five cents for the fees of said protest paid by this plaintiff, besides interest.

Wherefore this plaintiff demands judgment against the said defendants, for the sum of four hundred and fourteen dollars and fifty-seven cents, together with interest thereon from the twelfth day of February, one thousand eight hundred and fifty-six, besides his costs of this action.

The above defendants demur to the complaint of the plaintiff herein, and assign for a ground of objection thereto that it does not state facts sufficient to constitute a cause of action as to said defendants.

Special Term, December 1st, 1857.

Present, Hon. S. B. STRONG, Justice. The demurrer of the defendants George Sinclair and William Ann his wife, to the complaint in this action, having been argued, and after hearing John Paulding, Esq., of counsel for said defendants, in support of said demurrer, and Theodore F. Jackson, of counsel for

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plaintiff, in opposition thereto: It is ordered and adjudged, that the same be overruled with costs, and that the plaintiff have judgment thereon with costs against said defendants. And it is hereby further ordered that the said defendants have liberty to answer the complaint in this action, on payment of the costs of their said demurrer, a copy of such answer to be served, and such costs to be paid within twenty days from the service of a copy of this order. And in the meantime let proceedings on the part of the plaintiff be stayed

S. B. STRONG, Justice. This is an action on a promissory note by the payee against the maker and an indorser, who was a *feme sole* when she indorsed the note, but has since married, and her husband was made a party.

The note was payable to the plaintiff or his order, three months after its date. It was partly for a debt from the maker to the payee, existing at the time, and partly for prospective rent, and was made and indorsed pursuant to an arrangement between the maker and the payee to extend the time of the payment of the debt, and to preserve the continued occupancy of the demised premises, which was known to the indorser. It was indorsed in blank before it was delivered to the plaintiff. The note was presented to the maker when it became due, and payment was refused, and it was thereupon protested, and due notice given to the indorser.

As the note was negotiable, and there is no express engagement by Mrs. Sinclair, as guarantor, she must be considered as an indorser only. The allegation in the complaint, that she agreed to guaranty the payment of the note, is not, therefore, made out; but as that is coupled with the averment that she agreed to indorse it, what is said in reference to the guaranty may be considered as surplusage. The plaintiff can sustain his suit if he should prove enough of the averments in his complaint to maintain an action, although he may fail in establishing the whole.

The main question is, whether one who has indorsed a note before delivery, can be made liable to the payee who has not

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indorsed it? That one may become an indorser, under such circumstances, appears to be well settled. An indorsement by the payee is undoubtedly essential to a valid transfer of the note when it is payable to his order; and when he actually indorses it, I cannot see that he can maintain an action upon it against a subsequent indorser. That, if permitted, would be an inversion of the usual order of liability. The idea of the late chancellor, that a subsequent indorser may be rendered responsible to a prior one by an indorsement by the latter, without recourse to him and a delivery of the note to some nominal plaintiff who might prosecute for him, was denounced when it was advanced, by a learned member of the court for the correction of errors, and at any rate is not now considered to be sound law.

That any one who writes his name upon the back of a negotiable note not then indorsed by the payee, assumes an inchoate liability, there can be no doubt. If the name and signature of the payee should afterwards be prefixed, that would be clearly all that would be formally necessary to consummate the responsibility. That would, as I conceive, be absolutely necessary in all cases when the holder was to be any other than the payee.

But is there the same or any necessity for an indorsement by the payee when there is a general indorsement by another designed for his benefit? What is the general engagement by the indorser? It is to pay the note to any subsequent holder, provided it is duly presented to and payment refused by the maker, and due notice of non-payment is given. It can make no difference, as I conceive, whether the subsequent holder is the payee or another. There is the same equity in favor of either, and there is no technical rule against the liability to the payee, unless he is also the prior indorser.

An indorser of a promissory note is considered in the light of a drawer of a bill of exchange upon the maker to pay the amount to any subsequent holder, whether named or not. (*Clitty on Bills*, 155, 156, and the cases there cited.) Surely he can make the bill of exchange payable to the person named in

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the body of the note as the payee. There is no principle applicable to commercial paper which forbids that. That it may be an order upon the maker to do what he at the same time engages to do, can make no difference. That is done, or is the effect of what is done, in other cases; as when there has been a previous promise of the drawer of a bill of exchange to accept it, or where a bill payable at a future day has been accepted. There are in such cases, both an order from one, and a promise by another, upon such order already made, or to be made to pay. In substance, the note in question contains a promise to pay money to the payee upon the order of the indorser; and that under such circumstances, an action may be maintained by the payee against the indorser, was decided in the case of *Willis agt. Green*, (10 Wend. 516.)

There is no necessity for proving a valid consideration for the obligation of an indorser, and certainly none for reducing the consideration to writing. He is not considered as entering into a special promise to answer for the debt, default or miscarriage of another person within the statute. An entire want of consideration might be available between the original parties at common law, but in this case enough is averred to create the liability of an indorser.

The case of *Gilmore agt. Spies*, (1 Barb. S. C. R. 158, and 1 Comst. 321,) was much like that now under consideration, except that no notice had there been given to the indorser. He escaped solely on that ground.

The counsel for the defendants in that case, who was an acute and experienced lawyer, contended before this court, that the indorser was "only liable on condition of a demand of payment at the expiration of the days of grace and notice of non-payment." He did not contend, nor did this court assume, that the indorser would not have been liable if demand of payment had been given, duly made and notice of non-payment had been given. If, in that case, the indorser did not originally assume any liability to the payee, that would have been a sufficient defence for him; and it would have been unnecessary to consider any other. When the case was before the

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court of appeals, the defendant was considered by Judge BRONSON to be an indorser, and as such entitled to notice of non-payment. Such was also the opinion of Judge JEWETT, but Judge GARDINER dissented, and held that the defendant by his indorsement contracted that if the note was duly demanded of the maker, and not paid, or if after the exercise of due diligence, no such demand could be made, he would on due notice pay the amount to the indorsee or holder. In that case, as in this, the action was by the payee of a note against the indorser, and neither counsel nor any of the judges supposed that the indorser did not assume any liability to the payee. In the case of *Herrick agt. Carman*, (12 *Johnson*, 159,) the note, it is true, had been indorsed by Herrick when it was delivered to the payees, but they subsequently prefixed their indorsement and then sold it to Carman, at a large discount, to whom the facts were known. Chief Justice SPENCER remarked, that it did not appear that Herrick indorsed the note for the purpose of giving the maker credit with the payees, or that he was in anywise informed of the use to which the maker intended to apply the note; and that in the absence of any proof to the contrary, the court must intend that Herrick meant only to become *second* indorser, with all the rights incident to that situation. The chief justice adds, that Herrick must have known that his indorsement would be nugatory, unless preceded by that of the payees of the note. He cites no authority for this, and it is to be presumed that what he said was in reference to the circumstances of that case; and that he did not intend to lay down the rule as of universal application.

The case of *Ellis agt. Brown*, was where there had been a transposition of indorsements, and the question was, whether in such case, an indorser in effect could recover against his indorsee, and it was rightly decided that he could not. That is certainly the rule where the payee of the note actually indorses it, or where his indorsement is necessary to give it effect in the hands of him who seeks to enforce it. But in the present case, no indorsement by the payee was necessary in order to perfect his right. His rights, whatever they were, accrued

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when the note was delivered to and accepted by him, and were in no manner dependent upon any additional indorsement; what they were has been already shown.

I repeat, that the rule that the payee must first indorse the note, is founded upon the fact, that he alone can transfer it; and that when, as in this case, there was no transfer, the reason of the rule fails; and it is, therefore, inapplicable.

There must be a judgment for the plaintiff, with leave to the defendants Sinclair and wife, to withdraw their demurrer and answer in twenty days, upon the payment of costs.

JOHN PAULDING, *counsel for appellant.*

First. The action must either stand upon the note itself, or upon the special contract set up in the pleadings.

Second. It cannot be maintained upon the paper as a promissory note; the import of the instrument being that the indorser is secondarily liable after the payee. (*Dean agt. Hall*, 17 *Wend.* 214; *Seabury agt. Hungerford*, 2 *Hill*, 80; *Hall agt. Newcomb*, 3 *Hill*, 233; *Oakley agt. Johnson*, 21 *Wen.* 588; *Labron agt. Woram*, 1 *Hill*, 91; *Tallman agt. Wheeler*, 17 *John.* 326; cited in *Story on Promissory Notes*, 2d ed. § 476.)

Before the case of *Hall agt. Newcomb*, (3 *Hill*, 233, 7 *Hill*, 416,) the defendant under the circumstances of this indorsement as to time, might have been held as guarantor, if upon sufficient consideration. (*Story on Promissory Notes*, 2d ed. §§ 133, 134, and cases cited.)

But since that, by that case and those of *Spies agt. Gilmore*. (1 *Comst.* 321); and *Ellis agt. Brown*, (6 *Barb. S. C. R.* 282,) an indorsement cannot by intrinsic evidence be turned into a guaranty; that theory fails.

The idea that it may be treated as a bill of exchange, was discussed and elaborately reviewed by the court in *Ellis agt. Brown*, (*supra*,) and was overruled by three judges against one.

Third. The whole substance of the recent decisions is, that the statute of frauds must be sustained, when the conceded facts are such as to bring the case within its provisions.

In this case, the special contract set up in the complaint

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must be taken as a substitute for the blank indorsement, (if the court will modify the written contract as made and accepted by the parties,) and over the blank indorsement must be written, that "I hereby indorse *and guaranty* the within."

This would be void, as not being an original promise. (*Brewster agt. Silence*, 4 *Sel.* 207; *Brown agt. Curtis*, 2 *Comst.* 225; *Durham agt. Manrow*, *id.* 533; *Hall agt. Farmer*, *id.* 553.)

(The word *guaranty* is not surplusage, as is suggested by Judge STRONG, (*folio* 13,) as it is in the conjunctive with "indorse," and is as much a part of the agreement as any other word.)

Fourth. It is sought to evade the statute by making this an absolute instead of a conditional promise; and certainly if the note had been drawn to *defendant's order* and indorsed by her to the plaintiff, it would have been so under the common law rules of evidence, and defendant would not have been permitted to introduce evidence to change the character of the written contract. But as on the paper the defendant stands as second indorser by commercial law, the only means of making that the basis of an absolute promise to the payee, is to ask the court to remodel it by an equitable interference, so as to make the note payable to defendant's order. When, however, as the ground for changing the contract, they present facts which show that defendant was not an original promissor, but was engaging to answer for the debt and default of another, the court will not intercede in opposition to the policy of the statute. If they will so intercede, they might as well at once draw up a new contract of guaranty, and express a consideration.

By the statute of frauds, (2 *R. S.* 4th ed. p. 317, § 2, *subd.* 2,) "the legislature intended to protect parties not only against the loose recollections and uncertain interpretations of witnesses, but also against their own inconsiderateness in entering into obligations for others which might eventuate in their own ruin." (*Per* STRONG, *Justice*, in *Brown agt. Curtis*, 2 *Comst.* 233.) In the case now under review, there was not the

slightest consideration of advantage to defendant; and the court should not interfere to change her contract.

The only case relied upon by plaintiff, (since the new rule established by *Hall* agt. *Newcomb*,) is that of *Spies* agt. *Gilmore*, *supra*. It is cited as a negative, and because Mr. Crist, the defendant's counsel, did not avail himself of the ground as to the second indorsement, it is brought out in opposition to the settled law, which has never been questioned since *Herrick* agt. *Curman*, (12 *John*. 159.) This case is incidentally cited as law, in over thirty cases since its decision. See also the remarks of the court in *Ellis* agt. *Brown*, *supra*, where the omission is alluded to on pages 290, 291.

Last'y. Where it appears by admitted facts that the promise whatever be its form, (if insufficient under the statute,) is to answer for the debt, &c, of another, it must be void by the absolute terms of the statute. No exception is made therein as to forms, nor any reference to the rules of evidence affecting written instruments. If the plaintiff would rely upon the instrument as absolute in its terms, he must rely on that alone. If he brings his case within the statute he must fall by it.

THEODORE F. JACKSON, *counsel for respondent*.

The complaint in this action shows:

That the note in question was indorsed by the appellant, W. Ann Sinclair, before its delivery to the payee, who is the plaintiff herein. (*Folio* 4.)

That said note was so indorsed in pursuance of a prior agreement that said appellant would indorse said note to this plaintiff, and for the purpose of giving the maker credit with the payee. (*Folios* 2, 3, 4.) That said defendant had due notice of the non-payment and protest of said note. (*Folio* 5.)

First. The facts alleged are sufficient to constitute a cause of action against the defendant, W. Ann Sinclair.

1. There was no necessity for alleging any consideration for the indorsement. (*Willis* agt. *Greene*, 10 *Wend*. 516.)

2. But if it were necessary, the consideration alleged is suf-

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ficient. (1 *Parsons on Contracts*, 363, 369; *Story on Promissory Notes*, § 186; *Spies agt. Gilmore*, 1 *Comst.* 321.)

Second. The defendant W. Ann Sinclair, is liable to the plaintiff upon the note in question as an indorser.

1. The defendant Sinclair was in effect the payee of the note, and by her indorsement engaged to pay the same to the plaintiff, on receiving notice of non-payment by the maker. (*Bishop agt. Hayward*, 4 *Term R.* 470; *Bayley on Bills*, ch. 5, p. 179, 3d *London ed.*)

2. Or if the defendant cannot be considered in effect as the payee, then the note amounts to a promise to pay to the payee upon the order of the defendant, who by her indorsement engages to pay to any subsequent holder of the note, whether named or not. (*Chitty on Bills*, 155, 156; *Willis agt. Greene*, 10 *Wend.* 516; *Spies agt. Gilmore*, 1 *Comst.* 321; *Hall agt. Newcomb*, 7 *Hill*, 416; *Seabury agt. Hungerford*, 2 *Hill*, 80; *Moore agt. Cross*, 23 *Barb. S. C. R.* 534; *Nelson agt. Dubois*, 13 *Johns. R.* 175.)

Third. The contract of the indorser is not within the statute of frauds.

By the court—EMOTT, Justice. The precise question which is discussed in the opinion delivered by the learned judge at special term, has been decided in two recent cases in this court in different ways. This is not to be wondered at, considering the present unhappy constitution of the court and the obscurity in which the question is involved, partly by decisions, but more by *dicta* of the judges. In *Ellis agt. Brown*, (6 *Barb.* 282,) three of the judges of this court at a general term in the sixth district, (Judges GRIDLEY, C. GRAY and ALLEN, Judge PRATT, dissenting,) held that when A indorsed a note made by B and C, payable to D, although the indorsement was made expressly to give credit to B and C, and that they might obtain goods of D upon the credit of A, which they did; yet that a holder of the note who received it from D for the purpose of suing it for the benefit of D, could not recover upon it. I understand the decision to be made upon the ground that the

rights of the plaintiff were precisely those of D, and that D could maintain no action *on the note* against A. I do not understand that the transfer was considered by the court to make any difference. In fact, I think the case is put distinctly by the court, upon the ground that it did not. If so, the case is directly in point against the present action. On the other hand, the judges of the first district have supported the opposite doctrine in *Moore agt. Cross*, (23 Barb. 584.) The authority of this case however is weakened by the fact that it was really only a formal judgment resting on the opinion of Judge ROOSEVELT alone. The case was first argued before Judges ROOSEVELT, CLERKE and DAVIES. The latter two judges held that an action could not lie by a payee against an indorser, under the circumstances of that case, which were like the present. A re-argument was ordered, but without waiting for it to be had, Judge MITCHELL, who was then on the bench, concurred formally in the views of Judge ROOSEVELT, Judge DAVIES dissenting and adhering to the opinion of Judge CLERKE, on the first argument.

In the case of *Spies agt. Gilmore*, in the court of appeals, (1 Comst. 394,) Judge BRONSON speaks of the early cases in which the character and extent of the liability of an indorser to the payee of a note is discussed and determined, as cases which hold in effect that a written contract of one kind may be turned into a contract of a different kind by parol proof, and he says, that after some time and some difficulty, they have been got rid of. It is undeniable that the case of *Hall agt. Newcomb*, in the court of errors, (7 Hill, 416,) and the case of *Spies agt. Gilmore*, to which I have just referred, have overruled the doctrine of the early cases, that a man who wrote his name upon the back of a note payable to a third person, in order to give the maker credit with that third person, can be treated as a guarantor or joint maker. But I think it is not as yet by any means clearly ascertained what we are to have in place of this doctrine, or in what manner and upon what theory parties are to be held liable in such cases.

It will be needful to notice briefly the cases. In *Herrick*

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agt. *Carman*, (12 *J. R.* 161,) there was not sufficient proof of privity of the defendant with the consideration, or that he meant to be anything else than a second indorser. The decision is indisputably correct, but Judge SPENCER expresses the opinion that if that proof had been supplied, the defendant could have been held as a guarantor, and that is no longer good law in this state. The note in that case was payable to the order of the payee whose rights the plaintiff represented. In *Nelson agt. Dubois*, (13 *J. R.* 175,) the opinion which had been expressed *obiter* in *Herrick agt. Carman*, was adopted and applied by the court; as it was in *Campbell agt. Butler*, (13 *J. R.* 349.) It may be material to remark, that in *Nelson agt. Dubois*, the note was payable to bearer, but in *Campbell agt. Butler*, it was payable to the order of the payee. In *Dean agt. Hall*, (17 *Wend.* 214,) it was held that a party who had put his name on the back of a promissory note payable to the plaintiff or bearer, could not be treated as a guarantor or joint maker, but must be charged as an indorser, if at all. This case was followed by *Seabury agt. Hungerford*, (2 *Hill*, 84,) in which also the note was payable to the payee or bearer.

The principle of these cases, and it is very clearly expressed in the opinion in the latter case, is, that when the form of the note is such, that with proper diligence, the defendant could not be charged as an indorser, the plaintiff may write over his name a contract which would carry out the intention of the parties. But when, as in that case, the note being in legal effect payable to the bearer and the insertion of the name of the plaintiff as payee being immaterial, the defendant could have been charged as an indorser, he cannot be charged in any other way. The learned judge who delivered the opinion, concedes that if the note had not been negotiable, or if for any other reason, the case had been such that the defendant could not have been charged as indorser, the courts rather than suffer the contract to fail altogether, would write such a contract over the defendant's name as the proof justified. In *Hall agt. Newcomb*, (3 *Hill*, 233,) the note in question was payable to the plaintiff or order, and was indorsed by the defendant for

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the accommodation of the maker. The suit was brought without giving the defendant notice of non-payment, intending to treat him as guarantor or joint maker. The supreme court held that this could not be done in the case of a note payable to the order of the plaintiff, any more than when the note was payable to bearer; and upon the same principle, Judge COWEN says that the maxim *ut res magis valeat quam pereat* lies at the basis of construing a simple indorsement as a guaranty or an absolute promise. That is, whenever the contract and the intention of the parties must fail altogether unless this is resorted to, such a forced construction will be made, but not otherwise. He adds, that the plaintiff in that case (the payee) might have put the note in such a form by indorsing it himself as to charge the defendant as second indorser. And the result of this case with the other authorities, is, that it is not necessary to turn an indorsement into a guaranty or a joint promise, in order to save the contract from total failure in any case except where the note is not negotiable. When this case of *Hall agt. Newcomb*, went to the court of errors, (7 *Hill*, 416,) the judgment of the supreme court was affirmed by a majority vote, after two arguments.

This established the principle that such an indorsement can be made available to the payee as such, and so as to hold the party making it as an indorser for the benefit of the payee; and, therefore, the holder of such a note, whether payee or indorsee, will not be allowed to treat a party who has made such an indorsement, otherwise than as an indorser. Chancellor WALWORTH delivering the leading opinion, sanctions the reasoning and conclusions of the supreme court, and proceeds to show how such an indorsement can be made available to the payee of the note. And although his views upon this point were characterized by Senator BOCKER, as recommending a finesse and shuffling game, unworthy the dignity of the law, that remark was made in a dissenting opinion, in which the learned senator endeavored to restore the old rule by which the defendant could be treated as a guarantor or joint maker. His argument was that to render the defendant liable as an in-

dorser, required a sort of finesse which the law would not resort to, and therefore under the rule that the contract and the design of the parties should not be permitted wholly to fail, and by the maxim *ut res magis valeat quam pereat*, the courts must make out a contract of guaranty or joint undertaking. Whether his reasoning is sound or not, it is not for me to say; it is sufficient that it was overruled and the contrary doctrine established. It may be added that in making this decision the majority of the court not only adopted the conclusion but the views of the chancellor. Senators BARLOW and WRIGHT, who were the only other members of the court who delivered opinions, concurred in the view taken of the case by the chancellor, as well as in the result of his argument. The late case of *Spies agt. Gilmore*, in the court of appeals, (1 Comst. 321,) was similar in its circumstances to *Hall agt. Newcomb*. The judgment of the supreme court was affirmed, on the ground that the defendant could not be made liable as guarantor or maker. I agree that the case sustains the doctrine that he could be made liable as indorser, for under the principles which run through the cases to which I have just adverted, and which are expressly approved by Judges BRONSON and JEWETT, in this case, if the defendant could not with proper diligence have been charged as an indorser, the court was bound to treat him as a joint maker. The opinions of the court of appeals do not, however, afford us any light upon the question, in what manner or upon what theory this is to be done. After much consideration of the question, and of the able and ingenious reasoning of my learned associate, in the court below, as well as of the well considered opinion of Judge ROOSEVELT in *Moore agt. Cross*, above referred to, I am unable to agree with their view of the defendant's liability. It is true, of course, that the engagement of an indorser, (and it must be remembered that we are not to hold the defendant as an indorser of commercial paper strictly,) is to pay the note to any subsequent holder, if it is duly presented to and payment refused by the maker, and due notice given to the indorser. But this liability is only to a *subsequent holder*, and the question is, how or in what man-

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ner, under what circumstances the payee of a note can become or be a subsequent holder to a party whose name is not in the note at all? We must make this out by the note itself, for we are refused the aid of parol evidence, or at most we can only resort to it to prove the consideration and authority for the written contract of indorsement which is to be supplied above the defendant's name. It strikes me, that neither the payee nor any one else can be such a subsequent holder, unless he has received the note from the indorser. He must be a party to whom that indorser, or some one deriving title through him, has transferred it, because if the note has not been properly transferred to him he is not a holder at all, and if it has not been transferred by the agency of the party to be charged, the holder cannot be subsequent to that party. I do not understand an indorsement as anything else than a contract of transfer. If the note is not negotiable, that is transferable, writing a man's name across the back of it for any purpose whatever it may be, is not legally an indorsement. When it is said that the contract of an indorser is equivalent to drawing a bill of exchange on the maker, it means a bill of exchange referring to the terms of the note indorsed. There cannot be a bill of exchange made upon the back of a note, unless the maker upon the face of it has promised either directly or indirectly through prior indorsers, to pay the note to this indorser, who thus orders him to pay it to some one else. Until the payee has made his bill of exchange or drawn his order upon the maker whose promise to him lies at the foundation of the matter, no one else can make such a draft or bill, at least not effectually. The opinion in the court below admits, as I understand it, that if this note had been transferred to a third party, there could be no recovery upon it, and there would be no valid contract by the defendant unless the plaintiff had first indorsed it. I am unable to see how the indorsement of the defendant can be valid for the plaintiff, and nugatory as to any subsequent claimant at the same time, or how her engagement is one thing to the plaintiff, and something else to all others, while it is still strictly an indorsement to all;

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especially when the plaintiff can only recover by placing himself in the position of such a holder or indorser. If we were at liberty to allow the plaintiff in his peculiar position to treat her as a maker or guarantor, the reasoning would be well enough. But we have no such right. The long and short of the matter is, that the plaintiff here claims that the defendant Ann Sinclair, has indorsed to him a note, which upon the statements in his pleadings she never could have indorsed, because she never was either payee or indorsee, so as to enable her to indorse again to any subsequent party. It will be remembered that we are not inquiring what the plaintiff might do or had a right to do, but what he alleges that he has done. Under the Code, the title of a plaintiff to a note must be set out, and all the facts alleged, which are necessary to a recovery. I think the only way in which the present plaintiff could make such a note as this available, would be by indorsing it to the defendant without recourse, and then taking the defendant's indorsement as the source of his title as well as the foundation of his rights. The proof of the extrinsic facts stated in the complaint, will be necessary to justify this apparent transposition of the parties to the note, but it will justify it, and, therefore, these facts are properly alleged.

But the complaint is defective in not stating such a transfer. It does not show the defendant to have indorsed the note at all in a legal sense, and the plaintiff must get an indorsement, and not rely on parol proof of a contract, or he cannot recover under the present doctrines of the courts. The process by which this is to be accomplished may be called a manœuvre, but it is a necessary one, and, therefore, it must be performed and then alleged and proved.

I am compelled to the conclusion that this complaint is defective, and that the order of the special term should be reversed with costs, and judgment ordered for the defendant on the demurrer, with leave to the plaintiff to amend on the usual terms.

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SUPERIOR COURT.

WILLIAM H. DISBROW agt. SPENCER B. DRIGGS.

The superior court in the city of New-York have adopted the rule not to grant the removal of a cause to the United States courts, without *notice* or *order to show cause*.

A notice of *retainer* given by an attorney for the defendant does not prevent an application for the removal of the cause into the United States court. Nor does an agreement of the plaintiff and his attorney with the defendant, giving him *further time to answer*, prevent such an application.

In removing a cause on such an application, the state courts must be satisfied of two things. 1st. The *alienage or citizenship* in another state of the petitioner. 2d. That the *sum* in dispute exceeds \$500.

The mode of ascertaining these facts must be open to each court. No doubt the ordinary and general mode would be by *affidavits*. But in every case where it can be applied, it is settled that the *demand* of the plaintiff in his *declaration*, decides the *sum* in dispute.

Special Term, September 26th, 1858.

MOTION to remove a cause into the circuit court of the United States.

HOFFMAN, Justice. The agreement of the plaintiff and his attorney, made upon the application of the defendant as well as his attorney, that the defendant have further time to answer, there being no notice of appearance given nor any other step taken on the part of the defendant, is not the *entering* of an appearance, so as to preclude the application to remove the cause, under the act of Congress. (5 *Duer*, 605; 3 *Duer*, 686.)

2. It is settled in our state, that a notice of retainer given by an attorney for the defendant, does not prevent the application. (*Cases cited, ibid.*)

3. The state court is to be satisfied of two things; first, the *alienage or citizenship* in another state of the petitioner; next, that the *sum* in dispute exceeds five hundred dollars. It is

true, that the language appears to refer to the latter fact only, but the true interpretation must be, that both facts, the establishment of which renders it the duty of the state court to make the order, are to be made out to its satisfaction.

4. The mode of satisfying the court is not prescribed or indicated. As to the sum in dispute, the court of common pleas in *Kanouse agt. Martin*, received an affidavit of the plaintiff as to what was demanded, and Chief Justice BRONSON approved of the course, and adopted the conclusion. But the court in that case permitted the declaration to be amended after a petition to remove had been presented, reducing the damages below \$500, and this was held by the supreme court of the United States, to be error. (15 *Howard's U. S. Rep.* 257, 1853.)

A similar course had been taken in a case in Massachusetts, to that pursued in *Kanouse agt. Martin*, in New-York. (*Ladd agt. Tudor*, 3 *Minot & Woodbury*, 328, 1847.) Whether it would be justified under the decision in 15 *Howard*, may admit of doubt. The rule then is settled that the demand of the plaintiff in his declaration, decides the sum in dispute.

But in cases where this test is not applicable, the mode of satisfying the court must be open to its own course of proceeding in ascertaining facts. No doubt, the ordinary and general mode would be by affidavits. Under our system, a reference could be had, I think, in a proper case of difficulty, under the 271st section of the Code.

5. These observations apply equally to the other fact to be made out, viz: citizenship or alienage. In the case of *Ladd agt. Tudor*, before cited, the learned judge noticed the sworn petition as the first piece of testimony of a residence in New-Hampshire; next, that the plaintiff had in his writ described the defendant only as *cormorant* in Massachusetts; and lastly, observed that the plaintiff had not denied the allegation of the petition in any affidavit. I do not doubt, that the fact of citizenship is a fact which may be traversed, and if traversed, is to be inquired into and passed upon by the court, in one or other of its methods of ascertaining facts.

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6. These and other considerations, have led to the adoption of the rule in this court, not to grant an order of removal, without notice or on order to show cause.

In the present case, I am satisfied, upon the affidavits, that the residence and citizenship of the defendant elsewhere, is made out.

SUPREME COURT.

CLEMENT A. WILSON, Executor of the will of HANNAH GODFREY, deceased, and others, her heirs at law, and devisees and legatees named in her will agt. PETER B. LYNT, and THE BAPTIST CHURCH in Oliver street in the city of New-York.

In 1845, Hannah Godfrey, the testatrix, made her will, whereby she directed that upon the death of her mother, the value of her lot fronting on Constant street in the village of Hastings, (in the county of Westchester, New-York,) should be estimated as land only, irrespective of any improvements which should be made thereon, and that the amount so estimated should be paid by her executors out of the produce of her real or personal estate, to the trustees of the Baptist church in Oliver street, in the city of New-York, to be by them put out at interest *until*, with the additions which should be made by subscriptions or otherwise, a sufficient sum should accumulate to enable the trustees of that church to erect in the said village of Hastings, a church or place of worship for christians of the Baptist denomination.

The will contained a general power to the executors as trustees, to sell and dispose of all the real and personal estate of the testatrix, and directed them to divide the proceeds, after the payment of her debts and the performance of the trusts mentioned in the will, to her brothers and sister, and the children of a deceased brother.

The testatrix after the making the will, sold the lot on Constant street, for \$350. The value of the lot subsequently increased so that at the death of her mother in 1856, it amounted to from \$1,000 to \$1,500, irrespective of any improvements made thereon, subsequent to the date of the will.

After the date of the will and during the lifetime of the testatrix, a church was erected by the Baptists in Hastings, sufficient to accommodate all of that de-

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nomination residing in that part of the county, to which she contributed the sum of \$50.

The acting executor having in his hands about \$700, the remains of the personal estate of the testatrix, after payment of debts and expenses, and all her bequests, except those to the Baptist church, and the residuary legatees; and having sold the real estate to the defendant Lynt, for \$2,600, but not having given any title, the plaintiffs asked this court for a legal construction of the doubtful provisions of the will.

Held, that under the Revised Statutes, (1 R. S. 773, § 4,) and the decision of the court of appeals in *Williams* agt. *Williams*, (4 *Seld.* 525,) applying the provisions of the statute to bequests to religious societies, the direction for *accumulation* for that object in the will was *inoperative and void*.

As the fund could not be used for the designated purpose nor for any other, according to the terms of the will, except to accumulate until there should be sufficient to erect the church at Hastings, the *absolute ownership* would in the meantime be suspended. That might be for a longer period than during *two lives* in being at the death of the testatrix, contrary to the express provisions of the Revised Statutes.

The question then arises, are devises and bequests to religious incorporated societies *exempt* from the provisions of the Revised Statutes to prevent *perpetuities*?

Held, that the decision of the court of appeals in *Williams* agt. *Williams*, (4 *Seld.* 525,) must control and govern the decision of that question in this case; that is, that the general and strong language of the Revised Statutes against the perpetual suspension of the absolute ownership of personal property, is *inapplicable to religious societies*, and that as to them such suspension may endure for all time to come. (*From which decision the judge differed in toto in celo, and would have decided adversely had it been considered an open question.*)

Held, therefore, that the legacy to the Baptist church, could not be sustained either as a contribution towards building another church, or to defray the expenses of the edifice which was erected during the lifetime of the testatrix. 1st. That the bequest could not be effectuated without violating the provisions in the Revised Statutes against accumulation. 2d. That the proposed object had been accomplished through other means in the lifetime of the testatrix.

Besides, *it seems* that trustees of an incorporated religious society have not the capacity to take property devised or bequeathed to them in trust for other societies.

Held also, that although the legacy to the Baptist church was void, the power to sell the real estate of the testatrix was valid, and that the defendant Lynt must complete his purchase.

Brooklyn Special Term, December, 1857.

APPLICATION by plaintiffs for the construction of provisions in a will.

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H. S. MACKAY, *for plaintiffs.*R. S. ROWLEY, *for defendants.*

S. B. STRONG, Justice. The testatrix by her will directed that upon the death of her mother, the value of her lot fronting on Constant street, in the village of Hastings, (in the county of Westchester,) should be estimated as land only, irrespective of any improvements which should be made thereon, and that the amount so estimated, should be paid by her executors out of the produce of her real or personal estate, to the trustees of the Baptist church in Oliver street, in the city of New-York, to be by them put out at interest, until with the additions which should be made by subscriptions or otherwise, a sufficient sum should accumulate to enable the trustees of that church to erect in the said village of Hastings a church or place of worship for christians of the Baptist denomination. The will contains a general power to the executors as trustees, to sell and dispose of all the real and personal estate of the testatrix, and directs them to divide the proceeds, after the payment of her debts and the performance of the trusts mentioned in the will, to her brothers and sister, and the children of a deceased brother. The will was made in 1845. The testatrix afterwards sold the lot on Constant street for \$250. The value of the lot subsequently increased, so that at the death of her mother in 1856, it amounted to from \$1,000 to \$1,500, irrespective of any improvements made subsequently to the date of the will. The acting executor has now in his hands about \$700, being what remained of the personal estate of the testatrix, after payment of her debts and funeral expenses, and all her bequests, except those to the Baptist church and the residuary legatees. He has recently sold the real estate to the defendant Lynt, for \$2,600, who is willing to take a conveyance and pay the purchase money, provided this court shall decide that the executor can make a good title, but (as he is advised that the power to sell and convey the land is doubtful) not without, and until such determination. After the date of the will, and during the lifetime of the testatrix, a

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church was erected by the Baptists in Hastings, sufficient to accommodate all of that denomination residing in that part of the county, to which she contributed the sum of fifty dollars. The plaintiffs now ask for a determination of this court, giving a legal construction of the will, and passing upon the validity of its doubtful provisions, in order that the executor may safely execute the powers conferred upon him, the purchaser may be quieted in his title or protected in refusing to take any, and the beneficiaries under the will may receive the portions to which they are entitled.

The principal question involved in this action, relates to the bequest to the Baptist church in New-York, for the erection of a church edifice for worshipers of the same denomination in Hastings. It has been contended for various reasons, that it cannot be maintained. The counsel for the plaintiffs suppose, that if it had originally sufficient elements of vitality it failed upon, and by reason of the sale of the lot on Constant street by the testatrix after she had executed her will. That would have been the effect if the devise had been of that lot or its proceeds. But it was not of either. The will directed that the lot should be estimated, and that the amount at which it should be estimated, should be paid to the trustees of the church out of the produce of her real or personal estate. The lot was designated simply to ascertain and fix the extent of the gift. Possibly, the testatrix may have supposed that her residuary donees would have an equivalent in the lot to what would be deducted from their respective portions; but a devise or bequest does not fail simply because the moving consideration may have ceased to exist, or to be available. The fact that the will was not subsequently revoked or altered, would be indicative of a continuance of the intent, whatever may have been the original motive.

There is no positive direction to erect a church at Hastings, but as the trustees of the church in New-York are required to put out at interest the principal fund bequeathed to them until with the additions from subscriptions or otherwise, a sufficient sum should accumulate to enable them to erect the church

at Hastings, a direction to that effect is clearly and sufficiently implied.

The proposed accumulation is not exclusively, if at all, for the benefit of minors, nor is it to terminate at the expiration of the minority of any one. It is not therefore such as are allowed by the Revised Statutes. (1 R. S. 773, 774, § 3.) Those statutes provide (§ 4) that all directions for the accumulation of the interest, income or profits of personal property other than such as are therein allowed, shall be void. As the court of appeals have permitted that provision to apply to bequests to religious societies, (*Williams agt. Williams*, 4 *Selden*, 525,) the direction for accumulation in the will in question is inoperative and void.

As the fund could not be used for the designated purpose, nor indeed for any other, according to the terms of the will, except to accumulate until there should be sufficient to erect the church at Hastings, the absolute ownership would in the meantime be suspended. That might be for a longer period than during two lives in being at the death of the testatrix. The Revised Statutes declare that the absolute ownership of *personal property* shall not be suspended by *any limitation or condition whatever* beyond the lives which I have indicated. That avoids the bequest in question, unless it is saved by the consideration that it is to a religious society and for pious purposes.

It has been supposed that devises and bequests to religious incorporated societies are exempt from the provisions of the Revised Statutes to prevent perpetuities. One reason assigned is, that the act relative to religious societies which at the time of its passage authorized them to hold property in effect in perpetuity, has not been repealed. It is true that religious societies might previously to the passage of the Revised Statutes have held property for an unlimited period. So might in effect any family. But it by no means follows that an express limitation to that effect would have in either case been valid. Possibly it might have been allowed to religious societies, as there was no statutory provision to the contrary. Perpetuities were

not antecedently prohibited by statute. They were prevented by judicial legislation, and the same power may have sanctioned an exemption from the general rule in favor of ecclesiastical bodies. But there is nothing in our statutes relative to religious societies, requiring them to hold property given to them in perpetuity. Indeed, they are expressly authorized to sell *any* real estate belonging to them through an order of a court of equity. (3 R. S. 210, § 11.) According to the decision of the court of appeals in *Robertson agt. Bullions*, (1 *Kernan*, 287, 8th proposition,) it is at least doubtful whether a religious incorporated society can take a title to real estate with a perpetual suspension of this power of alienation. Clearly these religious societies can take and hold lands or personal property for two lives, or a shorter term, under their general authority to purchase and hold real and personal estate. (3 R. S. 205, § 4.) The greater power to acquire the fee or the absolute property, includes the less, provided that is not crippled by any illegal restriction. General laws relative to the acquisition of property and the duration of estates, ordinarily relate to corporations as well as individuals, whether the acts of incorporation are continued with or without express modification. It has never been supposed that religious incorporations were exempt from the provisions of the Revised Statutes prescribing the manner of making wills or contracts. Why should gifts to religious societies be in perpetuity? Is it not enough that one should control the destination of his property for two lives beyond the period when it can be subjected to his use? If after that period has expired it must be subject to the absolute disposal of those who may be controlled by new and unforeseen circumstances, can that be prejudicial to the cause of religion? Surely not, if the officers of the society should be faithful and conscientious, and if not, who can guard property from the future abuse of bad men? It seems to have been the general opinion in England, from the time of the statute of mortmain, down to the passage of the act of 3 George the II^d, (*chapter 36*,) that donations to corporations, whether for secular or pious purposes, should be subjected to

some restrictions, and in that sentiment there is a very general concurrence in this country. But if they are not subject to the restrictions upon the acquisition and enjoyment of property provided in the Revised Statutes, there are none in this state. And men who are conscience stricken upon their death beds, may divert their property from the enjoyment of those who may have strong natural claims upon them, and appropriate it forever to the advancement of a religion which may or may not be true.

It has been decided, however, by our court of appeals, that the general and strong language of the Revised Statutes, against the perpetual suspension of the absolute ownership of personal property is inapplicable to religious societies, and that as to them, such suspension may endure for all time to come. (*Williams agt. Williams, supra.*) In differing from that high tribunal in that particular, as I do *toto in celo*, I may be exempted from the charge of presumption, by the history of the case which I have just cited. That action was brought to annul two legacies, one to a religious society and the other to certain trustees for a charitable purpose, of 6,000 dollars each, to accumulate by the addition of half of the income, until each should amount to 10,000 dollars, to be held in perpetuity for purposes which permanently suspended the absolute ownership. In its different stages it was heard by eleven judges. Of those, Judge RUGGLES, (who had as vice-chancellor affirmed the validity of those bequests,) and Judge DENIO, of the court of appeals, and Justices MORSE, MASON and WILLARD, of the supreme court, (but sitting in the court of appeals,) sustained the legacies, while they were condemned as null and void by Judges GARDINER and JOHNSON, of the court of appeals, and Justices TAGGART, (sitting in that court,) Mr. COWEN, BARCULO and BROWN, of the supreme court, so that the judgment which was eventually pronounced, was actually against the opinion of a majority of the judges. Possibly that may lead to a reconsideration of the questions involved, and a different determination by that high tribunal, especially as it has in some instances reversed its own decisions. (*Brewster*

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agt. *Silence*, 4 *Selden*, 209, expressly overruling *Brown* agt. *Curtis*, 2 *Comstock*, 225; and *Durham* agt. *Manrow*, *Idem*, 583, and *Robertson* agt. *Bullions*, 1 *Kernan*, 243, and an unreported case relative to a direction for charitable purposes to an unincorporated association, overruling some of the points decided in *Williams* agt. *Williams*.) In this court, however, I am bound by the decision in *Williams* agt. *Williams*, and in accordance with it, must hold that donations to incorporated religious societies, are exempt from the provision of the Revised Statutes to prevent perpetuities.

There are, however, two strong objections to the validity of the bequest to the Baptist church in this case, which remain to be considered. First, that it could not be effectuated without violating the provisions in the Revised Statutes against accumulation; and, Second, that the proposed object was accomplished through other means in the lifetime of the testatrix. If it can be sustained at all, notwithstanding the direction for an illegal accumulation, it must be through the English doctrine of *cy pres* or approximation. In England, where property has been donated for charitable purposes, it is considered as an absolute dedication, and that where the object cannot be accomplished as donated or designed by the donor, the king can by virtue of his prerogative, through his chancellor, upon an information filed by the attorney-general, devote it to some charitable use corresponding as near as may be with the original design. In the case of *Williams* agt. *Williams*, the court of appeals made a practical application of that doctrine. There was a direction in the bequest of the principal sum to the religious society, that one-half only of the income should be appropriated in payment of the salary of the clergyman of the parish, until the principal should be increased by accumulation to a specified sum, nearly double of the original amount. The court decided, however, that the entire income might be paid towards the clergyman's salary from the interest. That was contrary to the donation in the will, and could only be justified, if at all, by the principle of approximation. Still, the learned judge who gave the prevailing opinion said: "It is

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unnecessary to decide in this case, whether we could proceed upon the notion of approximation, when it is impossible to execute the gift substantially according to the terms of the grant or devise. My own opinion is, that the distribution of powers among the great departments of the government, which is a fundamental doctrine in the American system, would prohibit the courts from exercising a jurisdiction so purely discretionary." In the unreported case in the court of appeals to which I have alluded, the non-applicability of the doctrine of approximation in donations for charitable purposes, is expressly adjudicated. In the case under consideration, therefore, the legacy to the Baptist church cannot be sustained either as a contribution towards building another church, or to defray the expenses of the edifice which was erected during the lifetime of the testatrix.

I am strongly inclined to agree with the counsel for the plaintiffs, that the trustees of an incorporated religious society, have not the capacity to take property devised or bequeathed to them in trust for other societies. It is not given to them by the statute relative to religious incorporations, and they have none from any other source. The trust is not confided to the trustees as individuals, but in their official capacity, and as officers they cannot take property except for the use of their society.

The remaining question is, whether as the power to sell the property of the testatrix was for the purpose of paying the legacy to the church which has failed, as well as for the satisfaction of other legacies, it is still valid and can be successfully executed? If the sole object of the power had been to raise the requisite funds for the payment of the rejected legacy, it would have doubtless failed. But that was one only, and not positively one, of the objects for which the property was to be sold. The main design was to effectuate an eventual distribution of the principal part of the property of the testatrix among her favored relatives. In such cases, where the principal design can yet be effectuated, although some comparatively unimportant object not expressly qualifying the delega-

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tion, (and it is not thus qualified in this instance,) may fail, the power is valid and of course available. It would be most unreasonable and unjust to hold that a power to sell such estate for the payment of legacies must fail, because one of such legacies may have lapsed or failed for any cause. The title of the defendant Lynt, to the property purchased by him, could not, as he seems to apprehend, be invalidated by any misapplication of the purchase money by the acting executor. (1 R. S. 730, § 66.)

No objection has been raised that the causes of action in this case could not with propriety be included in one suit. As the objection if raised, might have been in effect obviated by the substitution of distinct suits for the separate causes of action, it can be effectually waived. A decree must be entered declaring that the proposed legacy to the Baptist church is void, that the power to sell the real estate of the testatrix is nevertheless valid, and that the defendant Lynt must complete his purchase.

The costs of the several parties must be paid out of the estate or its avails in the hands of the executor.

SUPREME COURT.

JOHN WARWICK, Appellant agt. THE MAYOR, ALDERMEN
AND COMMONALTY OF THE CITY OF NEW-YORK, and
others, Respondents.

Where the plaintiff in his complaint claimed that as the *proprietor* in 1837, of a certain lot of land bounded on West street in the city of New-York, he was entitled to a grant in fee from the corporation of the city of New-York, of certain lands under water, adjoining such lot; and prayed that such a grant to him individually be directed to be made; but if he was not entitled to such grant, he then asked as a *tax payer* for himself, and all other *tax payers of the city*, that a grant of said land under water, which had been made by the corporation to one Robert A. Durfee, in 1852, and all subsequent grants under the

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same, be declared void, making the present claimants and parties in interest under the grant to Durfee, parties defendants.

Held on demurrer, that as an original question of pleading independent of the Code, the wrongs complained of, would have been considered as constituting two distinct causes of action, calling for different remedies; but under the Code, as the relief asked for the tax payers and the relief asked for the plaintiff individually, related to the *same subject matter*, only one was required, and only one could be granted; which, was the question for the court.

Held, that the plaintiff could not in the same complaint, first present his own individual wrongs for judicial relief, and then the wrongs of the public, although relating to the same subject matter. The Code does not authorize this kaleidoscope sort of pleading, alternating for the judgment of the court.

A *tax payer* as such merely, has not such an interest as enables him to maintain an action in behalf of himself and all other tax payers of the city, to avoid a deed or grant which has been actually executed by the corporation, upon the ground of fraud, want of authority, or irregularity. (*This follows the decision of Roosevelt agt. Draper, ante, page 137.*)

Also *held*, that the plaintiff's individual pre-emptive right as proprietor to the premises, was not under the act of 1837, (§ 4.) a right or interest in land, but a right to the grant of a right or interest in land. That act did not give the title of the people to the proprietors, but to the mayor, &c. It secured to the proprietor the first offer of a sale of a right or interest, the right to purchase a right and interest in the land under water first. And the plaintiff's estate and interest in the premises having passed from him prior to the act of 1837, by the foreclosure and sale of a mortgage thereon, he has not been since, and is not now entitled to the grant which he claimed under the act of 1837.

New-York General Term, October, 1858.

THE facts in this case are fully stated in the opinion of the court.

SAMUEL A. FOOT, *for appellant.*

A. R. LAWRENCE, JR., *for respondents.*

By the court—SUTHERLAND, Justice. The complaint in this action appears to be a sort of fishing complaint. The plaintiff spreads a broad net. If he can't get anything for his own individual benefit, he then goes for the benefit of all the tax payers of the city of New-York.

He claims that as the proprietor in 1837, of a certain lot of land bounded on West street, in the city of New-York, he is entitled to a grant in fee from the corporation of the city of

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New-York of certain lands under water, adjoining said lot; and prays that such a grant to him individually be directed to be made; but if he is not entitled to such grant, he then asks as a tax payer for himself and all other tax payers of the city, that a grant of said land under water, which had been made by the corporation to one Robert A. Durfee, in 1852, and all subsequent grants under the same be declared void, making James S. Thayer and Miner C. Story, the present claimants, and parties in interest under the grant to Durfee, parties defendants.

Now the defendants demur to this see-saw, swinging complaint, which leaves the end finally to settle uppermost, to depend upon the end the judicial foot is put upon, on the ground (among others) that it contains two causes of action which are improperly united.

Whether according to a critical analysis of Code definitions there are two distinct causes of action or not, I should have held as an original question, that the wrongs complained of were different, and the remedies asked for different, and inconsistent to be complained of, and to be asked for in the same action; for the plaintiff's individual rights as a proprietor stated in his complaint are inconsistent with the rights of the tax payers as therein stated; and if the plaintiff is entitled to the grant from the corporation, then there is no need of declaring the grant to Durfee void, and the tax payers have not been injured or defrauded by that grant.

The plaintiff does not pretend in his complaint that there is more than one cause of action; he does not pretend that there has been more than one wrong, or that there is more than one remedy needed; but he is in doubt whether he alone has been wronged, or all the tax payers of New-York; he goes in for himself individually first, and if he should fail, then in a spirit of enlarged benevolence for the tax payers generally.

The relief asked for the tax payers, and the relief asked for himself, relate to the *same subject matter*; only one is required and only one can be granted; which, is the question for the

court. The theory of the complaint is not, therefore, that there are two causes of action.

But can the plaintiff, in the same complaint, thus first present his own individual wrongs for judicial relief, and then the wrongs of the public, although relating to the same subject matter; especially when, if the plaintiff is right in his view of his own rights and wrongs, the public have no rights, and have suffered no wrongs whatever?

I think not. I think the Code does not authorize this kaleidoscope sort of pleading, alternating for the judgment of the court; presenting different phases of the same act or acts, or of different acts relating to the same subject matter, and presenting different wrongs as these acts affect different parties in the same complaint for judicial redress. By the Code the plaintiff must state the facts which constitute his cause or causes, (if he has more than one which may be united, and he chooses to unite them,) of action; but the Code does not authorize this omnibus sort of complaint, stopping as it goes along to take in other parties.

By the Code, the plaintiff may in his complaint present the facts which constitute *his* case or cases, if *he* has more than one which may be united; but he cannot experiment with the court by trying first his own case, and then that of himself and others. The Code may cover a multitude of sins, but it is not so charitable as to permit the plaintiff to drop his own case and take up that of himself and neighbors in the same action. These would have been my views upon the question of pleading, raised by this ground of the demurrer in this case.

I have not looked into the decisions upon this or analogous questions in the books; for this point raised by the demurrer has been rendered quite unimportant in this case, by the decision in the case of *C. V. S. Roosevelt agt. Draper and others*, at the last May general term in the first judicial district. In that case it was held, that a tax payer as such merely, has not such an interest as enables him to maintain an action in behalf of himself and all other tax payers of the city *to avoid a deed*.

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or grant which has been actually executed by the corporation, upon the ground of fraud, want of authority or irregularity.

With that decision falls all that part of the plaintiff's complaint as a tax payer, merely setting forth the rights and wrongs of the tax payers at large of the city of New-York, and claiming that the grant to Durfee, &c., should be declared void. According to this decision, the plaintiff's complaint does not show that he has any cause of action, unless as proprietor of the lot on West street, described in the complaint, he is entitled to a grant of the land under water adjoining, from the corporation of the city; and one of the grounds of demurrer being, that the complaint does not state facts sufficient to constitute a cause of action, the only remaining question raised by the demurrer is, whether on the facts stated, the plaintiff is entitled to a judgment that the corporation execute such grant to him.

This is the important question in this case; and although it appeared at first a question of some difficulty, and much learning and logic were exhausted on the argument of it, yet it turns out upon examination, I think, to be exceedingly simple, requiring only a careful attention to the facts and a close scrutiny of the nature or character of the pre-emptive right claimed by the plaintiff to the land under water, under the act of 1837, for its solution. Now, what are the facts stated in the complaint bearing on this question, whether the plaintiff himself has a right to a grant from the corporation for the lot of land under water, in question. In 1827, the mayor, &c., of the city of New-York, being the owners in fee of a certain lot of land under water, upon the easterly shore of Hudson river, adjoining West street, granted the same in fee to one James Patten. In 1832, Patten conveyed a part of the same in fee to one Mercein. Patten and Mercein, subsequently filled in the same, and streets and wharves were laid out and constructed thereon. Afterward, in 1833, Mercein by his two several conveyances, conveyed several parts or portions of the same to the plaintiff in fee, and at the same time the plaintiff executed a mortgage of one part to Mercein for eight thousand dollars, and of the other

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part to the New-York Equitable Insurance Company for one thousand dollars. Afterwards, in June, 1833, Mercein assigned his mortgage to the insurance company: and in 1835, the plaintiff executed another mortgage of one of the parcels, so conveyed to him, to the same insurance company for three thousand dollars. In 1836, these mortgages were all assigned to the mayor, &c., of the city of New-York. In 1840 and 1842, the mayor, &c., foreclosed these mortgages; purchased the mortgaged premises for ten thousand dollars, and obtained a master's deed therefor.

By section 3 of the act of April 12th, 1837, establishing the Thirteenth Avenue in the city of New-York, and extending the exterior limit of the city along the eastern shore of Hudson river, between Hammond and 135th streets, the mayor, &c., were vested with all the right and title of the people of the state to the lands covered by water between Hammond and 135th streets, and extending westerly from the westerly side of lands under water granted to the mayor, &c., under the act entitled "An act relative to improvements in the city of New-York," passed February 25th, 1826, to the westerly side of Thirteenth Avenue, as established by the act of 1837.

The premises so granted to Patten by the mayor, &c., in 1827, and parcels of which were so afterwards conveyed by his grantee to the plaintiff, and mortgaged by the plaintiff, was a portion of the land under water, the title to which was vested in the mayor, &c., by or under the act of 1826.

By section 4 of the act of 1837, "the proprietors of all grants of lands under water, or of water lots, heretofore made by the said mayor, &c., shall have the pre-emptive right in all grants to be made by the said mayor, &c., of any lands under water granted to them by this act, adjacent to, and in front of the lands so heretofore granted, &c."

The plaintiff claims, that notwithstanding his mortgages, he was when the act of 1837 was passed, proprietor of the mortgaged premises, within the meaning of section 4; and being such proprietor then, *has now* notwithstanding the foreclosure

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and sale under the mortgages, this pre-emptive right, and is now entitled to a grant from the corporation.

If this mere statement of the plaintiff's facts and claims, is not sufficient to show that he has no claim to this pre-emptive right or grant now, a very slight examination of the nature or character of this pre-emptive right will make it perfectly clear, that if the plaintiff as proprietor of the mortgaged premises, when the act of 1837 was passed, took or had this pre-emptive right under the act, it passed from him by the foreclosure and sale with his proprietorship and title in the mortgage; *not as a vested right or interest in or to a specific, separate, independent piece or lot of land; or even as an appurtenance to or of the mortgaged premises; not as a right or interest or estate in any lot or land; but as a right to an interest or title, or to the grant of an interest or title in and to a certain specific lot of land, given to the proprietor of a certain other adjoining lot of land incident to and inseparably connected with the proprietorship of such other adjoining lot.*

This pre-emptive right, which it may be conceded the plaintiff had and took as proprietor of the mortgaged premises under the act of 1837, was not a personal independent right of the plaintiff capable of separate, independent conveyance or disposition; nor was it strictly an incident or appurtenant of the mortgaged premises, but of the plaintiff's estate and proprietorship in the mortgaged premises, and passed with such estate and proprietorship under the foreclosure and sale. The whole argument of the counsel for the plaintiff is founded on his starting error, that this pre-emptive right was or is a *right or interest in land*. It was and is a right to the grant of a right or interest in land. The act does not give the title of the people to the proprietors, but to the mayor, &c. The third section vests the title in the mayor, &c., and the fourth section secures to the proprietor *the first offer of a sale of a right and interest; the right to purchase a right and interest in the land under water first*. When a grant from the mayor, &c., under the act is called for, the question is, who is the proprietor, and who has been or was when the act was passed? All the

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plaintiff's estate and interest in the mortgaged premises having passed from him by the foreclosure and sale, nothing can be clearer than that he has not been since, and is not now entitled, to the grant which he claims under the act of 1837.

The defendants must, therefore, on the whole case have judgment on the demurrer, with costs.

SUPREME COURT.

CHARLES BARTOW agt. LEVI C. CLEVELAND.

An action for the foreclosure of a mortgage belongs to that class of cases in which costs may be allowed or not, in the discretion of the court; but when allowed the items are specified by the Code, (§ 307.)

And the defendant has no right in such a case to make and plead a *tender* under the Revised Statutes. Such right is confined to actions at law.

There is no provision made for settling the costs in those cases in which the allowance is in the discretion of the court.

Therefore, in a foreclosure case, where the defendant wishes to pay the mortgage debt and costs *before judgment*, he may offer to pay the amount due upon the mortgage, and such costs as he may think proper, and upon a refusal to accept the amount, he may apply to the court for leave to pay the amount due, and such costs as the court may in its discretion allow, and the court should entertain the application, and permit the payment fixing the costs, and upon the payment being made order a discontinuance or stay of the action as may be proper.

As to *extra allowance* the Code allows it upon the *recovery of judgment* only. But in a case of this kind, the court must proceed upon entire principles of equity. And as it is equitable that the defendant should be permitted to pay and put an end to the action, and having no legal right to do so before judgment, the court should grant his motion upon equitable terms.

Those terms (if the court should allow costs) would be the payment of the items of costs, as specified in the Code, for particular services, so far as they had been rendered, and an extra allowance or such portion of it as should be equitable and just.

If the attorney for the plaintiff and the defendant settle the action upon such terms as the court would direct, such settlement will be valid and binding.

Eighth District, General Term, 1858.

ACTION upon a promissory note. The action was tried by

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the court without a jury, and the facts were agreed upon and submitted by stipulation. A brief statement of facts will present the question. The plaintiff is an attorney of this court, and commenced an action in April, 1857, against the defendant to foreclose a mortgage, upon which there was due \$760. The defendant appeared by an attorney, upon whom a copy of the complaint was served, and some time after that, the defendant called upon the plaintiff for the purpose of settling the action. The plaintiff made out the bill of costs, claiming a per centage of 10 per cent. upon \$200, and 5 per cent. upon the next \$400, and 2 per cent. on the remaining \$160, amounting in all to \$43.20.

The plaintiff claimed that he was entitled to this sum as per centage, but consented to remit \$16.04 from the bill as a matter of favor, and this was done, and the defendant gave the note in question including \$27.16 of the per centage claimed. The defendant offered to let the plaintiff take judgment for the amount of the note less the \$27.16 to be deducted as of the date of the note. The plaintiff declined this. The court decided that to the extent of \$27.16, the note was without consideration and void in the hands of the plaintiff, and gave judgment accordingly.

BARTOW & OLMSTED, *for plaintiff.*

WAKEMAN & BRYAN, *for defendant.*

By the court—MARVIN, Justice. The question here presented is not without its embarrassments. The action belonged to that class of cases in which costs may be allowed or not, in the discretion of the court. (*Code*, 306.)

It is not a case in which the defendant had a right to make and plead a tender, under the Revised Statutes, (2d Vol. 553;) such right is confined to actions at law; (9 *How.* 398; *Thurston* agt. *Marsh*, 14 *How.* 572;) nor is it a case where the plaintiff had a right to the additional allowances, as provided in § 308 of the Code, as no judgment had been recovered. (*Pratt* agt. *Conkey*, 15 *How.* 27.) Indeed, he had no legal right to

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any costs, as the allowance of costs was in the discretion of the court. (*Code*, § 306; *Pratt* agt. *Ramsdell*, 16 *How. Pr. R.* 60.) But when the costs are allowed, the items are specified by the statute. (*Code*, § 307.)

No provision is made for settling those cases in which the allowance of costs is in the discretion of the court. By section 322, provision is made in reference to costs upon a settlement before judgment, in the actions mentioned in section 304. That section relates to those actions known as actions at law, in which the allowance of costs is not discretionary in the court.

What then should be the practice in a case like the present? The defendant wishes to pay the mortgage debt before judgment, and is willing to pay costs. There is no statute giving the attorney an abstract right to any costs, nor is there any statute giving to the defendant the right to tender the amount due with or without costs. (*The New-York Fire and Marine Ins. Co.* agt. *Burrell*, 9 *How.* 398.) This was a foreclosure case, and the defendant made a tender before judgment. The plaintiff proceeded to judgment, and then applied to the court for an additional allowance, which was granted. The defendant cannot then by a tender arrest the plaintiff in proceeding to judgment, and thus deprive him of his rights relating to costs or an additional allowance. I say rights *relating* to costs, as those rights depend upon the discretion of the court. I suppose, however, if the court under § 306, allows costs to the plaintiff, then he will be entitled to the per centage as given by § 308, as that section reads, "In *addition* to those allowances there *shall* be allowed to the plaintiff upon the recovery of judgment by him," &c.

I think in a case like the present, the defendant may offer to pay the amount due upon the mortgage, and such costs as he may think proper, and upon a refusal to accept the amount he may apply to the court for leave to pay the amount due, and such costs as the court may in its discretion allow, and that the court should entertain the application and permit the payment fixing the costs, and upon the payment being made order a discontinuance or stay of the action, as may be proper.

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(See *Thurston agt. Marsh*, 14 How. 572.) I also think the parties may settle the action. The attorney may make out the costs by items, following the fee bill, and the defendant may pay such costs, and if the costs so paid are no more than the court would upon application allow, such payment will not be disturbed. As to any claim for an additional allowance there may be more difficulty, as the plaintiff is only entitled by the statute to such allowance upon the recovery of judgment. My opinion proceeds, however, upon entire principles of equity. It is equitable that the defendant should be permitted to pay and put an end to the action. But having no legal right to do this before judgment, he is obliged to come into court and ask its equitable interference. He asks for a favor, and the court may grant his motion upon equitable terms. Those terms, if the court should allow costs, would be the payment of the items of costs as specified in the Code, for particular services so far as the services had been rendered, and as to an additional allowance, I think the court would have the right also to impose as terms the payment of these allowances, or such portion of them as the court should deem equitable and just.

The allowance as provided by the Code, is not for any particular service, but in the language of CLERKE, Justice, "it is made for services performed throughout the prosecution of the action, rather than for services rendered at any particular stage of it." And if the plaintiff is entitled to such allowance after judgment, it is highly equitable that he should have a portion of it when the action is settled before judgment. The right to impose such terms rests, I admit, upon the equitable powers of the court, and not upon the statute. But the court would be greatly influenced by the statute as to the amount it would require to be paid, as the condition upon which the defendant would be released.

The order would of course be conditional, and if the defendant should not choose to avail himself of it, the action would proceed to judgment, when the plaintiff would be entitled to the per centage allowance, in case the court in its discretion

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allowed costs, which is almost a matter of course in a mortgage foreclosure case.

It must be kept in mind that the defendant has no absolute right by which he can arrest the action before judgment. The plaintiff has the right to proceed to judgment, unless he is stopped by an order of the court. It is a general principle in equity, that when parties do what a court of equity, upon application would direct to be done, the court will sanction and sustain the thing done. If the attorney for the plaintiff and the defendant settle the action upon such terms as the court would direct, I do not see why such settlement and arrangement should not be valid and binding. In all such settlements it will be incumbent upon the attorney that he see to it that no advantage be taken of the defendant, and that no greater sum be taken than the court upon an application would allow, as the question will be open to an examination by the court, upon the application of the defendant.

In the present case, the per centage as provided by the Code after judgment, amounted to \$43.20, from this sum \$16.04 were abated, leaving \$27.16, which was included in the note. After examining the facts, I am satisfied that the amount claimed and included in the note, was no more than reasonable, and no more as I think, than the court would have allowed as terms upon which an order as above indicated, would have been made upon the application of the defendant. In my opinion, the court upon the trial of this cause, should have sanctioned the settlement and directed judgment for the amount of the note. The judgment should be reversed, and a new trial should be had, costs to abide the event unless the defendant shall stipulate that the plaintiff take judgment for the amount of the note. If he shall so stipulate, then judgment to be entered accordingly, without costs to either party upon this appeal.

Justice GROVER dissented.

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SUPREME COURT.

WHITNEY and others agt. STEVENS and others.

Where actions for the foreclosure of several mortgages against a railroad company on their property are progressing in one judicial district, it is improper to allow another action brought in another district, asking for an injunction, receiver, &c., to compel the trustees of the several mortgages to take such legal proceedings as should be effectual to enable and cause the whole road to be exposed for sale at the same time, and to determine what property is covered by the securities, and what the respective interests of the bondholders under each mortgage are, &c.

To determine these questions in the last action, would be taking them from the tribunal that then had the legitimate possession of them.

New-York Special Term, January, 1858.

THIS is an action instituted in this district, for the purpose of disposing of certain questions involved in actions instituted in the eighth district, to foreclose two mortgages executed at different times and on different parts of their road, by the Buffalo and New-York City Railroad Company. The one mortgage was executed to secure \$700,000 to Knapp, Smith and Dehor, as trustees, bearing date on the 1st of July, 1857, on that portion of the road between Attica and Hornellsville, containing about fifty-nine miles. The other was executed to secure \$500,000, to John A. Stevens, as trustee, bearing date the 1st of November, 1852, on that portion of the road between Attica and Buffalo, containing about thirty-two miles. The last-mentioned portion of the road was not commenced when the first-mentioned mortgage was executed, nor were any lands purchased for its construction.

One principal object of this action also, is to compel the trustees of these several mortgages to take such legal proceedings as shall be effectual to enable and cause the Buffalo and New-York City Railroad to be exposed for sale together and at the same time.

Whitney agt. Stevens.

EATON & DAVIS, *attorneys for plaintiffs.*MANN & RODMAN, *attorneys for defendants.*

CLERKE, Justice. Without considering on this occasion the power or duty of the court in relation to the subjects discussed on this motion, or whether any proportion of the bondholders under these mortgages, without the actual concurrence of the whole, saying nothing of the decided opposition of many of them, can maintain an action of this description, it seems to me, that every relief and remedy to which the parties are entitled, can be obtained in the actions commenced for the foreclosure of the mortgages. The court, before whom these actions have been brought, can most appropriately determine what property is covered by these securities, what the respective interests of the bondholders under each mortgage are, what discretion it possesses to regulate the sale of the road, and if possessing any effectual for the purpose, whether it would be a proper exercise of that discretion, to order the sale of it as an entirety?

To determine these questions in this action, would be taking them from the tribunal that has now legitimate possession of them, and would be an indirect method of reviewing the decisions of a co-ordinate branch of this court, which we have no right to do directly.

Motions for an injunction and a receiver, are therefore decided, with \$10 costs.

SUPREME COURT.

WILLIAM TITUS, Respondent agt. PETER RELYEA, Appellant.

If any one principle more than another is well settled by the courts, it is that they cannot acquire jurisdiction by *laches*. And although a party may waive an irregularity by such means, courts cannot impart vitality to a void judgment by any action based upon *laches*, and an adjudication that there has been *laches*, does not of itself confer jurisdiction.

The 128th section of the Code, directs the summons to require the defendant to "serve a copy of his answer on the person whose name is subscribed to the summons at a place within the state to be therein specified, in which there is a post office," &c.

Held, that in cases of service by publication, the name of the state should somewhere appear; certainly it should appear in the summons, and perhaps in the complaint.

And where the summons as published, did not state the time and place of filing the complaint, but at the bottom of the summons, after the date and signature of the attorney, was this statement: "The complaint in said action, was filed in the clerk's office of the county of Montgomery, on the first day of October, 1857;" *Held* that a judgment entered upon such service was void for want of jurisdiction.

The 135th section of the Code, states that "in all cases where publication is made, the complaint must first be filed, and the summons as published must state the time and place of such filing." These are jurisdictional facts, and their omission in the summons as published, although contained in the notice following it, is fatal to the judgment.

General Term, Fourth District.

JAMES, ROSEKRANS and POTTER, Justices.

THIS is an appeal from an order of the special term, denying a motion to set aside a judgment. The motion was denied on the ground of *laches* alone. The action was commenced about the 1st of October, 1857, and the judgment entered on the 31st of December, 1857. The defendant was a non-resident of the state, living in the state of New-Jersey, and the service of the summons was claimed to have been made by publication under the Code.

The defendant in his affidavit states, that he resides in

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Newark, New-Jersey; that he removed there in October, 1857, from Plainfield, in the same state; that he never received any summons or complaint, or copy of either, nor any paper whatever in the case; that the first he ever heard of the action, or that one had been commenced, was about the 1st of January, 1858, and then he merely heard by accident of the commencement of the suit, but did not learn any of the particulars thereof, and that he had no definite or authentic information in regard to it, until about the 10th of February, 1858; he then got a copy of the judgment roll, from which he learned the grounds of the action, and the proceedings had therein, and from which it appeared that demands against him, arising in New-Jersey, had been assigned to the plaintiff, who had commenced this suit thereon, and attached a house and lot of the defendant's, situated in Canajoharie, Montgomery county, in this state.

The notice of the motion to set aside the judgment, was served on the 27th of February, 1858, for a special term to be held on the 9th of March, 1858. The motion was based on the grounds of *want of jurisdiction* in the action, and *irregularity*. These grounds will sufficiently appear in the opinion of the court. The notice of the motion was given by an attorney residing in the city of New-York, who appeared for the purposes of the motion only. The papers in opposition show no contradiction of the facts in the moving papers. The proceedings upon which the judgment was based, the judgment roll, and the defendant's affidavit, are the papers upon which the motion was made.

S. T. FREEMAN, *for appellant*

COOK & MORREL, *for respondent*.

By the court—POTTER, Justice. The defendant, by law in such a case as this, is limited in his application for relief to a *motion*, as the only remedy that exists for him to review the question of *jurisdiction* in a proceeding by which he may lose his estate. By the decision of the special term, he has been

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restricted even in this right of review, and directed to make another application, and to submit to such terms, if he makes that application, as the court before whom it is made may there impose; which terms may be to allow a judgment that may have been obtained without jurisdiction of his person or estate to remain as security to await a trial on the merits of the claim. And thus he may be cut off from examining the question of jurisdiction, not only by being compelled to submit to error against right, but by a reversal of the ordinary course of practice and having a judgment entered against him before trial. If the court had no jurisdiction in this case, such a decision is obviously wrong, because it is, and ever has been, the policy of this court, to allow the question of jurisdiction to be raised at any time. He ought to be allowed this privilege certainly, on the first he can get into court. Without jurisdiction, even in this court, the whole proceeding is *coram non judice*.

A party ought not by any compulsion in practice to be forced to admit jurisdiction. This motion, as has been stated, was denied solely on the ground of laches, and although I have not been able myself to discover any, still as they have been adjudged by a member of the court, I would not undertake to review the decision upon that ground, except that the question of jurisdiction, *to which laches never apply*, arises in the case. If any one principle more than another is well settled by the courts, it is that they cannot acquire jurisdiction by laches. And although a party may waive an irregularity by such means, courts cannot impart vitality to a void judgment by any action based upon laches. And an adjudication that there has been laches, does not of itself confer jurisdiction. Let us then examine the question of jurisdiction. In this case, claim is made of jurisdiction over the personal property of the defendant, by a substitute provided by statute, for personal service. In all such cases we are bound to see that the statute has been strictly pursued. The persons and estates of individuals would be subject to alarming hazards if jurisdiction could be obtained over them by anything less than the fullest compliance with all their requirements. In *Evertson agt. Thomas*,

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(5 *How. Pr. R.* 46,) PARKER, Justice, says, after citing various cases, "it will appear by these cases, how careful the courts have been to see that the statute is strictly complied with, in proceedings which subject property to seizure and sale without a personal service of process on the owner. The duty to protect against injustice is certainly none the less obligatory under the Code, which authorizes the recovery of judgment in so many cases on a mere publication of notice, substituted in the place of personal service."

The obvious design of the statute, which requires the commencement of an action to be by summons, is to give the defendant notice, not only of the commencement of the action, but when and most especially *where*, he may appear to defend it, and this whether served personally or by publication. A defendant residing in any state that has no Montgomery county in it, who should be sued in an action commenced by summons and complaint, sent to him by mail by a stranger, for a cause of action arising in his (defendant's) own state, which summons and complaint should communicate to him only the fact that the suit was commenced in the supreme court, Montgomery county, (without naming the state,) or though it should further state that the complaint would be filed with the clerk of that county, without naming the location of the clerk's office or the clerk's residence, would not be far advanced in the information necessary for his defence. The design of the statute in such case, would be quite ineffective to that end. If, as we are informed, there are fifteen states in the Union, each having a Montgomery county, he would rather find confusion and embarrassment from reading his papers, than the designed information which it was the object of the statute to communicate. And the time which is afforded by the statute to make his answer, might be quite too short for the purpose.

In my opinion, this is not a compliance with the strict demands of the statute, which requires the summons to state, "*where the complaint is, or will be, or has been filed.*" In cases of publication, the name of the state should somewhere appear; it should be in the summons, and I think that it should be in

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the complaint. That it should be in the summons, is entirely apparent to me, from the language of section 128 of the Code, which reads as follows: "The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons *at a place within the state to be therein specified.*" Now, whether it is the *state* or the *place*, or *both*, that is required to be specified, the object beyond all doubt is *so to specify* that it may avail to inform and not to confuse the party. In this case, neither *state* or *place* are specified in the summons or complaint. Had the clerk's residence, or the town or city in which the office was located been given, it might have aided the defendant in his necessary study of geography, this it did not give. In case of a personal service in the same state, this might perhaps suffice.

Taking the several sections of the Code, from section 127 to section 135 together, I have no doubt that the proper form of the summons required to be published in case of a non-resident defendant, is, that it should state that the complaint *has been filed*, and that it should have this form where the order of publication is obtained. Otherwise, as in this case, the summons annexed to the complaint, will not be a copy of the summons published. Where the defendant is a non-resident of the state, no diligence to serve is required to be shown, (§ 135, *sub. 3.*) The statement of the fact of non-residence, is sufficient to obtain the order of publication, and this fact is usually as well known before as after issuing the summons.

In the case of publication, the Code (section 135) requires that "*the summons as published, must state the time and place of such filing.*" This I think was not done in this case. The summons as published, is dated the 18th of September, 1857, and is an exact copy in every particular of the summons annexed to the complaint, and of that contained in the judgment roll, which states that the complaint *will be filed*. Appended to the summons *as published*, is a notice stating as follows: "The complaint in said action, (meaning doubtless the action

referred to in the summons,) was filed in the clerk's office of the county of Montgomery, on the first day of October, 1857.* This notice, it will be seen, could not have been appended earlier than the date of the occurrence to which it refers, to wit: the filing of the complaint, October first. It could not, therefore, have been a part of the summons issued on the 13th of September, nor of the one directed to be published by the county judge, on the 30th of September. This notice could not have been a part of the original summons, and is no part of the summons in the judgment roll. The party had no power to amend it. An amendment could only be made by an order of the court, and there is no evidence that this was obtained. The summons *itself*, therefore, as published, did not state *the time and place of such filing*. And although it may be said, that for all practical purposes the notice was just as good and just as communicative as the summons, yet this was a jurisdictional fact, and the omission to insert in the summons as published, that "the complaint *was filed*," and "the *time and place of such filing*," is fatal to the judgment. (*Randall agt. Washburne*, 14 *How. Pr. R.* 381, 382; *Hallett agt. Righters*, 18 *How. Pr. R.* 44, 45, 46, and cases cited.) See *Rawdon agt. Corbin*, (3 *How. Pr. R.* 416, 417,) *per HAND, Justice*, who says, "The order of publication should show that there *was* a summons and identify it. Ordering a summons to be published in anticipation of one being made out, would not connect them on the record, except by reference to the claim, which is unsafe. It is *the* summons which is to be published."

There are several other objections to the validity of this record, not necessary to be discussed. I am satisfied that the doctrine of laches upon which the special term placed the decision of the motion, was error in this case, because there was no jurisdiction acquired, and that the order made should be reversed with costs, the order set aside, the judgment set aside, plaintiff to be permitted to amend and re-serve the summons.

SUPERIOR COURT.

LAURA KEENE agt. JOHN LA FARGE.

If a sole defendant die pending an action after issue joined therein, and before trial, his personal representatives have no right to an order requiring the plaintiff to continue the action against them, as the defendants therein. In such a case, the plaintiff at his election may require that it be discontinued.

Special Term, October 28th, 1858.

THE defendant having died, leaving a last will and testament by which Louisa La Farge and John Binsse were appointed his executrix and executor, and letters testamentary having been issued to them, they on an affidavit of these facts and on the pleadings, now move "for an order to continue this action in the name of Laura Keene as plaintiff therein," against them as such executrix and executor, "as defendants therein, and to declare said action to be in the same plight and condition as the same was at the time of the death of John La Farge." The action was at issue on complaint and answer when La Farge died. The complaint sets out a written and sealed lease, executed by John La Farge to the plaintiff, of the Metropolitan Theatre, and alleges performance of all the covenants on her part, and that John La Farge during the term granted "wrongfully and in violation of the covenants of said lease, evicted this plaintiff from said premises and refused to fulfil the covenants of said lease." The owner denies that she kept the covenants on her part, and avers that she failed to pay the rent when due, and was for that cause dispossessed by summary proceedings pursuant to statute, which are set forth.

H. A. CRAM, *for the motion.*

E. L. HEARNE, *contra*, insists, 1st. That the cause of action does not survive, and 2d. That the executrix and executor cannot make such a motion, and that the plaintiff alone can

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make it, and 8d. That she does not desire to have the action continued.

BOSWORTH, Chief Justice. In so far as this action proceeds on the idea of a breach by John La Farge, of his implied covenant of quiet enjoyment by the plaintiff, (3 *Kernan*, 151,) it sounds in contract and continues. In so far as it is based on the allegation of a wrong done by John La Farge, to the rights of the plaintiff as his lessee, it continues by force of section 1 of 2 Revised Statutes, 447.

The only other question is, whether the representatives of the deceased defendant may move for and obtain an order continuing the action, or whether the option is given to the plaintiff alone to move or to omit to move, for such an order? The only authority for such a motion, is that furnished by section 121 of the Code. By that, after the lapse of a year from the death of a party, the court cannot allow the action to be continued except upon "a supplemental complaint," such a proceeding cannot be taken by a defendant.

Prior to the Code, the death of a sole plaintiff or of a sole defendant, before verdict or interlocutory judgment, abated an action at law, and it could not be continued by or against the representatives of the deceased. (2 *R. S.* 386 to 389.) The chancellor decided in *White* agt. *Buloid*, (2 *Paige*, 475,) that the personal representatives of a sole complainant who had died might, on their own motion, be substituted as complainants under section 115, 2 Revised Statutes, 184. The language of this section is as general as that part of section 121 of the Code, which applies to motions made within a year after the death of a party, with the exception that section 115 applies only to the case, "when a complainant shall die." But I find no provision in the Revised Statutes, broad enough to enable the representatives of a deceased sole defendant to make such a motion. Section 126, [120,] evidently applies to the case of the death of one of two or more defendants, and not to the death of a sole defendant.

If only the representatives of *such* a deceased party can make

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a "motion," within one year after the death, as can be allowed after the year, "on a supplemental complaint," to continue the action, then it would appear that section 121 was designed to confer on the representatives of a deceased sole plaintiff *only* the election to continue the action or to abandon it, and was not designed to enable the representatives of a sole deceased defendant to compel the plaintiff to continue the action against his will. Such a construction does not deprive the representatives of deceased sole defendant of any rights which they had prior to the Code, nor confer on the representatives of a deceased sole plaintiff any rights which those of a deceased sole "complainant in a suit in equity" did not possess, although in actions at law it enlarges the remedies of the representatives of a deceased sole plaintiff. This construction accords with the view taken of the Revised Statutes, by Chancellor WALWORTH, in *Souillard agt. Dias*, (9 Paige, 293.)

Motion denied without costs; but an order may be entered that the action be discontinued, unless the plaintiff serve within ten days after written notice of the order to be entered hereon a consent that an order be entered continuing the action.

SUPREME COURT

ROYAL BALL agt. HENRY WARREN and others.

THE FARMERS' BANK OF LANSINGBURGH agt. HENRY WARREN and others.

A motion to vacate or supercede a writ of *certiorari* issued to remove proceedings into this court, may be made before the return to the writ has been filed. But where the motion is to *quash* the writ for irregularity, it cannot be entertained until the return is made and filed.

A writ of *certiorari* to remove proceedings in an action into this court is ineffectual if not filed with the clerk of the court *before judgment* in the action.

Where judgment had been recovered in mayor's court against several defendants,

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and execution issued and levy made, but as to one of the defendants, an order of the court had been granted, staying proceedings to enable him to defend the action, and after issue joined he brought a *certiorari* to remove the cause into this court; *Held*, that it was too late, the judgment even as against this defendant had not been vacated, but remained of record.

Albany Special Term, December, 1857.

MOTION to set aside proceedings.

These actions were commenced in the Troy mayor's court, in March, 1857. Each action was brought upon a promissory note made by one Chichester, and indorsed by the defendants. On the 4th of April, 1857, judgment was perfected in each action against all the defendants by default. The amount of the judgment in the first action is \$312.39, and in the other \$369.86.

On the 14th of May, 1857, an order was made by the Troy mayor's court, upon the application of the defendants, by which the default and all subsequent proceedings in these causes were so far set aside, as to allow the defendants therein to interpose a defence within ten days. But the judgment entered, and the execution issued and the levy made in each of said causes was to stand as security for any judgment which might ultimately be recovered in the actions.

The defendant Warren, within the time allowed by the order, put in an answer in which he set up usury as a defence in each cause. The issues were noticed for trial at a term of the mayor's court, to be held on the 8th day of December. On the morning of that day, writs of *certiorari* were duly allowed by a justice of the supreme court, removing the causes into this court, under the provisions of the Revised Statutes relating to the removal of causes from inferior courts. (2 R. S. 389.) The defendant also offered to pay the costs of noticing the cause for trial. The costs were by stipulation between the parties taxed on the 9th of December, at about \$25 in each cause.

The plaintiffs moved to "set aside, dismiss and vacate," the writs of *certiorari* in each cause.

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M. I. TOWNSEND, *for plaintiffs.*A. C. GEER, *for defendant.*

HARRIS, Justice. It was objected on the part of the defendant that this motion is premature, inasmuch as no return had been made to the writs of *certiorari*. Were this to be regarded as a motion to *quash* the writs for irregularity, the objection would be well taken. But regarding it as an application to *supersede* the writs, because improperly allowed, the objection cannot prevail. "If the writ be misdirected or otherwise bad in point of law," says Tidd, "the court will order it to be *quashed* if before them, or if not returned will grant a *superseas*." (1 *Tidd's Pr.* 335. See also 2 *Burrell's Pr.* 250; *Graham's Pr.* 557; *Ferguson agt. Jones*, 12 *Wend.* 241.)

It becomes necessary, therefore, to inquire whether the writs were properly allowed. Judgments had been recovered against all the defendants in each action. Executions had been issued and a levy made upon the property of the defendants. As to all the defendants except Warren, these judgments and executions remain in full force. As to Warren, the effect of the order of the 14th of May, was not to vacate or set aside the judgments but to suspend proceedings until it should be ascertained by a trial whether this defendant in fact had a defence to the actions. If upon such trial he should be able to sustain his defence, the judgments might be set aside, but if not, then they would be enforced.

The statute provides that a *certiorari* to remove an action into the supreme court from an inferior court, shall not be effectual for that purpose, unless it be filed with the clerk of the court before judgment is entered in such action. (2 *R. S.* 389, § 7.) In these cases judgments had been entered, and had not been vacated. The writs, therefore, were not effectual to remove the actions. The plaintiffs are entitled to an order that the writs of *certiorari* be *superseded*. I think, too, that the defendant should be charged with the costs of the motion.

SUPERIOR COURT.

GUILD, Administrator of B. H. BENJAMIN, deceased, plaintiff and appellant agt. C. S. PARSONS, executor, and MARY TAYLOR, executrix, &c., of Wm. TAYLOR, deceased, defendants and respondents.

When an order is made, allowing an amended supplemental complaint to be served, and such a complaint is thereupon served, and the defendants appeal from such order, and also demur to such complaint, and the demurrer is sustained and such order reversed, and the plaintiff has appealed from the order sustaining such demurrer, the latter appeal necessarily falls by the reversal of the order allowing the amended supplemental complaint to be filed. Although an order will be entered on the application of the defendants, dismissing the appeal from the order sustaining such demurrer, the appeal will be dismissed without costs.

Before BOSWORTH, Ch. J., HOFFMAN, SLOSSON and PIERREPONT, Justices.

THE defendants move to dismiss an appeal taken by the plaintiff from an order, (made on the 19th of June, 1858,) sustaining a demurrer to plaintiff's amended supplemental complaint.

This amended supplemental complaint was served pursuant to an order made December 22d, 1856. The defendants appealed from that order, and demurred to the said complaint. Which of these two proceedings was first taken, does not appear on the papers on which the motion to dismiss was made. The order of the 22d of December, 1856, was reversed on the 26th of June, 1858, and a copy of the order of reversal was served on the 26th of July, 1858.

The plaintiff appealed from the order of the 19th of June, 1858, but whether before or after the 26th of June, is not shown on this motion. The defendants noticed that appeal for argument, for the October term, 1858, and placed the cause on the general term calendar, and now move on an

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affidavit of these facts, and on notice to the plaintiff, to dismiss the appeal.

By the court—BOSWORTH, Chief Justice. The ground on which the dismissal of the appeal is moved, is this: The order allowing the amended supplemental complaint to be filed, has been reversed, and consequently, as it is now claimed, that complaint and all proceedings had thereon are out of the cause. Upon this view, which we regard as the correct view of the matter, there was no reason why the appeal should have been noticed for argument, after the order of the 22d of December, 1856, had been reversed. Such a notice was not essential in order to move to dismiss the appeal.

A dismissal of the appeal was not necessary for the defendant's protection. The appeal fell, when the supplemental complaint, the demurrer thereto, and the order deciding such demurrer, (which latter order is the one appealed from,) ceased to be proceedings in the action. They ceased to be proceedings in the action upon the reversal of the order of the 22d of December, 1856. In the notice of the motion to dismiss, it is stated that costs of the motion will be asked. The motion being unnecessary, and the appeal having been brought practically to an end, by proceedings taken by the appellants, and which have resulted in reversing the order allowing an amended supplemental complaint to be filed, they are clearly not entitled to the costs of this motion. No objection is made to the entry of an order dismissing the appeal. The order to be entered will, therefore, dismiss the appeal without costs.

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SUPREME COURT.

CLAPP and others agt. UTLEY and others.

Where the assignee in the assignment for the benefit of creditors, was directed "to dispose of the property at such time, and in such lawful manner as he shall deem prudent and advisable, and to convert the same into money," *Held*, a valid and proper direction.

New-York Special Term, April, 1858.

MOTION for judgment of dismissal of complaint.

STORES & SEDGWICK, for plaintiffs.

G. O. HULSE, for defendants.

CLERKE, Justice. I will say in this case, what the court at general term said through me in *Bellows agt. Patridge*, (19 *Barbour*, 176,) that "the trust contains no express authority to delay the conversion of the property into money, beyond what the effectual performance of the trust necessarily required." In that case, the assignee was authorized in the instrument, "to convert the assigned property into money by sale, either public or private, as soon as reasonably practicable, with due regard to the rightful interests of the parties." In this case, the assignee is directed "to dispose of the property at such time and in such lawful manner, as he shall deem prudent and advisable, and to convert the same into money." In both cases, I think an equal amount of discretion is left to the assignees, but in neither "nothing more than what the effectual performance of the trust necessarily required." The exact moment of the sale can never be prescribed in the instrument, and if it cannot be prescribed, it must be determined subsequently, according to the best judgment of the assignee. The time must depend upon the peculiar circumstances of each case. The extrinsic circumstances are not sufficient to set aside this assignment. Complaint dismissed with costs.

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SUPERIOR COURT.

EDWARD P. FRY, Respondent agt. JAMES GORDON BENNETT,
Appellant.

Where an *order* is made and entered denying a motion for a new trial, and *judgment* is entered in the action in favor of the successful party, and an appeal in due form is brought by the opposite party from the *judgment* thus entered; such appeal does not authorize a review of the order denying a new trial.

Two appeals in such case are necessary, and although it may not be irregular to include both appeals in the same notice, it is authorizing an appeal where none has been taken, to allow an alteration or amendment of the *notice of appeal from the judgment*, so as to embrace both appeals, and it can no more be done than a new and separate notice can be permitted. And this is so although the party *intended* in good faith to appeal from and review the order denying a new trial. The court have no power to extend the time within which an appeal may be taken. (HOFFMAN, J., *dissenting*.)

The court are not authorized to do indirectly under color of amendment, what they may not do directly.

A notice of an appeal from an order when actually given in due season, if there be particular defects therein which do not destroy its substantial character, may be amended, and so of an appeal from a judgment.

But where a notice of an appeal from a judgment has been given, in all respects perfect and containing nothing more, the court may not allow an amendment so as to make the appeal also an appeal from an order denying a new trial after the time for appealing from such an order has expired.

Nor does the fact that the respondent on such appeal appears and argues some points, which properly belong to a motion for a new trial, waive any notice of appeal from the order denying a new trial; nor does such appearance give the court jurisdiction to reverse such order.

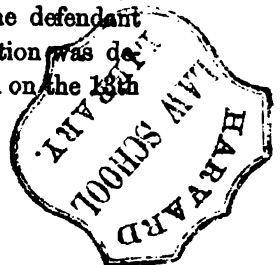
New-York, Special Term, April, 1858.

MOTION to amend notice of appeal.

B. GALBRAITH, *for appellant*.

F. R. SHERMAN, *for respondent*.

WOODRUFF, Justice. A verdict for the plaintiff on the trial of this action, was found by the jury on the 31st day of May, 1856. Before judgment thereon was entered the defendant moved at special term for a new trial. This motion was denied. The order denying a new trial was entered on the 18th



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day of April, 1857. The affidavit of the plaintiff's attorney shows that a copy of the order denying such motion for a new trial, was served on the defendant's attorney on the same day, April 18th.

Thereafter, on the 25th day of April, judgment was entered on the verdict, and it appears by the affidavit referred to, that written notice of the judgment was on the 27th day of April, served on the defendant's attorney. On some day thereafter, a notice of appeal from the judgment was served by the defendant's attorney. When this notice was served does not appear; it bears no date, and the affidavits submitted do not disclose the time of service. The cause was brought to argument on the appeal at the December general term, 1857, and the court now have the appeal under consideration. The counsel upon the argument of the appeal, submitted points and argued questions which it is now suggested could not properly be considered on an appeal from the judgment, but only on a motion for a new trial or an appeal from the order on such motion.

The appellant now applies by motion to amend his notice of appeal, so that the same shall be not only an appeal from the judgment, but also "from the order denying the motion for a new trial," averring that he intended to appeal from the last named order, and supposed that he had done so; that in truth no argument was had upon the motion at the special term, it being the understanding that the motion would be argued on the appeal from the judgment.

I. It is conceded upon this motion that an appeal from the order denying a new trial was necessary in order to bring such order under review. And this is, I apprehend, the settled rule prescribed by the Code, (§ 348,) and affirmed by repeated decisions. (*Hastings agt. McKinly*, 3 C. R. 10; *Marquart agt. La Farge*, 5 Duer R. 559.)

II. The notice of appeal in this case is simply and only from the judgment. There was *no* appeal from the order refusing a new trial. All that is averred is an *intent* to appeal therefrom, and a mistaken supposition that the appeal from the judgment was an appeal from the order also. The case is not,

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therefore, one in which a notice of appeal from the order was given, which is defective in some particular which might be amended, but I am asked by this motion to allow an appeal which by mistake of the defendant's attorney has never been taken. It would be a misnomer to call this an amendment. The notice served is complete in itself and in proper form to effect all that it purports; it is a proper and regular appeal from the judgment. For the purpose which the appellant has in view, two appeals were necessary, and although it may not be irregular to include both appeals in the same notice, it is authorizing an appeal where none has been taken, to allow an alteration of the notice which has been served so as to embrace two appeals instead of one, and it can no more be done than a new and separate notice can be permitted.

III. The case made by the papers submitted, do not warrant the treatment of this motion as an application to *amend*, not only for the reason above mentioned, which I deem entirely conclusive, but also because it does not appear that any notice of appeal was served within thirty days after the service of the order refusing a new trial, viz: April 13th, 1857. If the time for appealing from the order had expired before any appeal was taken, then there could be nothing to amend. And the appellant has failed to show on this motion that any notice of appeal was given within the time limited, so that whatever his intentions may have been, he has for aught that appears, suffered the time for appealing to pass.

IV. The motion, therefore, presents the question whether the defendant may be permitted to appeal after the time for an appeal limited by section 382 of the Code has expired?

I feel constrained to decline the consideration of the circumstances to which my attention is called by the papers submitted, which in the view of the defendant's counsel should influence me, if this motion were addressed to my discretion, because I am satisfied I have no power to permit an appeal after the thirty days prescribed by section 382 have expired. Not only so, in my opinion an appeal taken after the lapse of the thirty days would not give jurisdiction to the general term.

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The question whether the court can extend the time to appeal has been much discussed, and the decisions are contradictory. The power is alleged to be conferred by section 173 (now 174) of the Code as amended in 1849, and to be embraced in the authority to allow, "an answer or reply to be made or other act to be done, after the time limited by this act." The connection in which these words stand, indicates to my mind that they contemplate an act in the progress of a cause before judgment.

The next clause provides for relief from a judgment, &c., and the last for conforming proceedings actually taken to the requirements of the Code. Without entering at length into the discussion, I feel compelled to say that the court can no more allow an appeal after the time limited in express and absolute terms has expired, than they can allow a suit to be prosecuted and maintained after the time limited for commencing actions by chapter 4th has elapsed, and none I believe have gone so far as to hold that section 174 will warrant any such extension of the time limited for bringing suit.

"*Interest reipublice ut sit finis litium*," and the wisdom of this maxim has been recognized ever since we had existence as a state, and it has been shown not only in prescribing a time within which actions should be commenced after the cause accrued, as also in limiting the time within which appeals from final judgments might be prosecuted. I cannot and do not believe that the legislature, by the somewhat loose expression above quoted, intended to abrogate so wise a restriction and submit to the mere discretion of any court to say whether the party should be permitted to appeal, however long the period might be since the litigation was apparently ended, or should be permitted to prosecute, however long the period since the alleged cause of action arose.

The language of the 174th section is satisfied without giving it so comprehensive a meaning, and making it substantially repeal absolute restrictions specifically employed, and in my judgment too important to be overruled, unless the intent of the legislature is more clearly manifested. On this question the conflicting decisions which have been examined by me,

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may be found arrayed on either side of the question, as follows, viz: In support of the power to allow the appeal after the time has expired. (*Traver* agt. *Silvernail*, 2 *Code R.* 96; *Crittenden* agt. *Adams*, 1 *Code R. N. S.* 21; *Seely* agt. *Prichard*, 3 *Duer R.* 669; 12 *Leg. Obs.* 245; *Haase* agt. *The New-York Central Railroad Company*, 14 *How. Pr. R.* 430.)

And to the contrary are *Renoul* agt. *Harris*, (2 *Code R.* 71, 2 *Sandf. R.* 641,) decided before the amendment of the Code referred to; *Enos* agt. *Thomas*, (1 *Code R. N. S.* 67, 5 *How. Pr. R.* 361;) *Rowell* agt. *McCormick*, (5 *How. Pr. R.* 387; 1 *Code R. N. S.* 78;) *Lindsley* agt. *Almy*, (1 *Code R. N. S.* 189;) *The People* agt. *Eldridge*, (7 *How. Pr. R.* 108;) *Sherman* agt. *Wells*, (14 *id.* 522.)

An attentive examination of these cases, confirms my previous convictions that I have no power to grant the present motion. I do not overlook the fact that this court in general term have otherwise decided in the case in 3 *Duer*, above mentioned. If the matter stood before me under the authority of that case unimpaired by any authoritative expression of opinion, it might be my duty to yield my own opinions and follow that case; but since that decision, the case of *Humphrey* agt. *Chamberlain*, came before the court of appeals, (1 *Kernan R.* 274,) and although the jurisdiction of that court is so restricted that the error could not be reached by the appeal to that court, there was a clear and unqualified expression of opinion that the supreme court had no power to extend the time to appeal. The opinion is given as the opinion of the court without any qualification or dissent. Under such circumstances, if I am not bound by that opinion, (and that is by no means clear,) I am certainly at liberty to follow it when my own convictions concur therewith, notwithstanding a decision of our own general term made before the decision in the court of appeals was announced.

The motion must therefore be denied for want of power to grant it.

In settling the order made on the foregoing motion on a representation that the papers did not represent all the facts

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truly, leave was given to renew the motion. Whereupon, upon further affidavits, such motion was renewed. The further facts appear in the opinion which was pronounced on the renewal of the motion.

Special Term, June, 1858.

WOODRUFF, Justice. This case was before me in April last, on a motion for leave to amend the notice of appeal from the judgment, so that it should also be made an appeal from the order denying a new trial. That motion I felt constrained to deny for want of power to grant it.

Leave having been given to renew the motion, it is again brought before me upon further affidavits. I find no reason to change the opinion which I expressed upon the former motion, and my opinion then given must, therefore, be taken as my opinion upon the present motion, modified only by the suggestion which follows. It is now claimed by the defendant, that he sufficiently shows that the order of the special term denying a new trial, has never been served on him, or that he has never been served with written notice thereof, and therefore that his time for appealing from that order has not yet expired; that his taking the order itself as settled and signed by the judge before it was entered by the plaintiff, his causing it to be printed as part of his case on the appeal from the judgment, and whatever other actual notice he may have had of the order are not sufficient without a written notice served by the plaintiff's attorney, to limit the time for appealing.

I do not deem it necessary nor proper to pass upon that question here. For the purposes of the present motion, it must suffice to say, that such a state of facts constitutes no reason for *amending* the notice of appeal which was served. If the defendant's time for appealing has not expired, (by reason of the omission of the plaintiff to serve notice of the order,) then the appeal which the affidavit states the defendant has taken on the 25th day of May instant, (since the decision made by me

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of the previous motion,) will avail the defendant, and no amendment of his original notice of appeal is necessary. And on the other hand, if the actual facts shall be deemed tantamount to the written notice of the order contemplated by the Code, so that the time to appeal from the order has expired, then the views expressed by me on the former motion constrain me again to deny the motion to amend, unless I can allow an *intention* to appeal to have the effect of an actual appeal defectively taken or notified. It now appears that the notice of appeal which was given was served within thirty days after the denial of the motion for a new trial, (a fact which was not shown on the former motion.)

But the notice given was in no respect defective or imperfect. It was an appeal from the judgment, and nothing else, and in my former opinion I have given my reasons for holding that a mistaken supposition that such an appeal was also an appeal from the order, though coupled with an *intent* to appeal from the order, would not warrant an alteration of the notice, which in substance and effect was making it a new appeal. The motion must therefore be denied. The former motion was denied without costs, but it is the practice when a party renews a motion under leave given, after one denial, to impose costs if he be again unsuccessful. The denial here must, therefore, be with \$7 costs.

From the order so made, the defendant appealed to the general term. The appeal was argued at the June term, 1858.

General Term, June, 1858.

Before BOSWORTH, HOFFMAN, SLOSSON, WOODRUFF and PIERREPONT, Justices.

APPEAL from order at special term, denying motion to amend notice of appeal.

By the court—WOODRUFF, Justice. The court have no power to extend the time within which an appeal may be

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taken. The court are not authorized to do indirectly under color of amendment what they may not do directly. A notice of an appeal from an order when actually given in due season, if there be particular defects therein which do not destroy its substantial character, may be amended. And so of an appeal from a judgment.

But where a notice of an appeal from a judgment has been given in all respects perfect and containing nothing more, the court may not allow an amendment, so as to make the appeal also an appeal from an order denying a new trial, after the time for appealing from such order has expired, and so in substance and effect allow a new appeal.

An appeal from a judgment does not bring before the general term for review an order denying a previous motion for a new trial. To bring such an order under review, an appeal from the order is necessary. These conclusions embraced in the opinions given at the special term, on denying the motion upon which the present appeal arises, we now affirm. (Mr. Justice HOFFMAN, however, dissenting from our conclusion that the time to appeal to the general term cannot be extended.) It is not deemed necessary here to refer to the reasons which were there given, for the purpose of either repeating or reviewing them. But one ground for allowing an amendment in this case, or in the alternative permitting the defendant to file and serve a notice of appeal *nunc pro tunc*, is now urged upon our attention, which although the facts relied upon appear on the papers, was not prominently presented at special term, nor discussed in the opinions there given.

It is insisted by the defendant, that the omission to file or serve a notice of appeal, has been waived in such wise that the plaintiff cannot now allege the defect, and that it is, therefore, proper to allow either an amendment or the filing of the notice *nunc pro tunc*, to the end that the record may conform to the actual condition of the cause before the court; that the general term has actual jurisdiction of the appeal *as an appeal from the order denying a new trial*, by the appearance of the respon-

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dent and arguing the appeal, not only as an appeal from the judgment, but also as an *appeal from the order*.

Whether, when *no appeal* has in fact been taken, but the parties nevertheless appear before the general term, present a case purporting to be a case or exceptions on appeal, and argue the matters arising thereon, avowedly and unequivocally as an appeal, they should not be held concluded thereby, we do not think it necessary in this case to decide. There are strong reasons for holding that an appearance on appeal and an actual argument and submission of the questions arising upon the case to the court, without raising the objection that no appeal has been taken, is a submission to the jurisdiction of the general term, and operates to confer jurisdiction as fully as if a formal appeal had been taken by filing and serving written notice thereof. It is, however, not too much to say, that the assertion of jurisdiction by the general term, in the absence of any actual appeal, should proceed upon acts of the respondent unequivocal in their character, and either indicating an intentional assent thereto, or being at least plainly inconsistent with a claim that no such appeal is pending.

The allegations on the part of the defendant here, upon which it is claimed that there has been a waiver of an actual notice of appeal, and a submission to the jurisdiction of the court, are mainly as follows: That there was no argument of the motion for a new trial at the special term, but that there was an understanding and agreement between the attorneys and counsel for both parties that the motion should be denied *pro forma* and the whole matter considered at the general term. That the case made herein and used at the hearing in the general term contained all the evidence in the cause, and was thus prepared with a view to the discussion of all questions which the defendant's counsel might wish to raise on a motion for a new trial. That the counsel for the parties respectively did insert in their points used on the argument of the appeal from the judgment, grounds for granting a new trial, which could with propriety be only urged on such a motion, and could not properly be considered on an appeal from the judgment only.

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In relation to the first of the defendant's allegations, above in substance recited, the attorney for the plaintiff by his affidavit denies that there was any understanding or agreement of any kind between the parties than what is contained in the order itself, which denies the new trial. That order after reciting the motion and the grounds on which it was moved, denies the motion as "upon hearing counsel," and gives to the plaintiff liberty to perfect his judgment. It then provides that if the defendant *appeal from the judgment* within thirty days, such appeal shall operate as a stay of proceedings on such judgment pending the appeal. This order, if it throws any light upon this subject at all, indicates rather that no intent to pursue the matter as a motion for a new trial was entertained; and the defendant's attorney states in his affidavits, that the order was prepared by the defendant's counsel himself. So far as the order suggests anything, it is that an appeal from the judgment only was then contemplated. And in this direct conflict of affidavits, we do not find ourselves called upon to say that it is clearly shown that there was an agreement or understanding, such as is alleged on the one hand and denied on the other.

The case used on the argument of the appeal, no doubt contained all the evidence taken on the trial—that is not denied—no doubt the case as prepared for the purposes of the motion for a new trial, was printed without alteration, for use on the appeal to the general term; but when we recollect that however inconvenient and improper, it is a very common practice with a large portion of the attorneys at this bar, to present cases on appeal from the judgment, in the same form as here exhibited; and more especially, when we observe that there are in this case eighty-two exceptions, to the proper understanding and consideration of many of which, large portions of the testimony were essential, we think no great weight can be given to the circumstance that all the evidence was printed and furnished to the court on the argument of the appeal.

The remaining consideration is, that the counsel presented points on both sides, which could only be properly argued on

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a motion for a new trial. On the part of the appellant, out of forty-three points presented, three are found of this description. On the part of the respondent one is found, to wit: that the damages are not excessive. But it is to be observed that in the opening statement of the case as printed on his points, the respondent's counsel states explicitly that the cause "*now comes before the court upon a case upon an appeal from the judgment.*"

On the other hand, it is quite clear, that the respondent nowhere suggests on his printed points, that the questions whether the verdict is against evidence, or whether the damages are excessive, were not open to discussion on the appeal. It seems to us upon an examination of the points, in a high degree probable, if not quite clear, that the parties both supposed that all the points presented, might properly be discussed on the appeal then under argument.

But we are not prepared to establish deliberately by precedent, that if on an argument of an appeal from a judgment, a point is discussed without objection, which is not raised thereby, the appeal shall be thereby deemed modified, or that if a respondent's counsel places on his own points one in answer to the appellant, which is only pertinent to a motion for a new trial, that he thereby consents that the appeal be deemed converted into an appeal from an order denying such a motion. We know that such mistakes, usually founded in an erroneous apprehension of the subject, and sometimes from uncertainty in the mind of counsel, as to what questions the court will feel at liberty to consider on an appeal from the judgment, are of frequent occurrence. Probably not a term has passed since the Code of Procedure was adopted, in which more than one example of this description has not been exhibited. And when the court have had the notice of appeal before them, it has been very common, upon receiving the printed points, to call the attention of counsel to the distinction, and to pass over all points which are not addressed to the exceptions taken on the trial of the cause, or to the judgment rendered.

Upon a review of the affidavits submitted, and an examina-

tion of the points used, it seems to us quite probable that the counsel on the part of the appellant, intended to raise by the appeal the question whether the verdict was against evidence and whether the damages were excessive, and hardly less probable that the respondent's counsel supposed that those questions might properly be considered on an appeal from the judgment. But it is to be noticed that there was here an actual appeal pending that was an appeal from the judgment, and not an appeal from an order denying a new trial. The appearance of the respondent was in fact, an appearance to answer to the appeal which had in truth been taken; appearance, noticing the appeal for argument, and appearing in court to argue, and actually arguing the appeal, all these or any of them, neither expressly nor impliedly, admitted that any other appeal in the cause was pending than an appeal from the judgment, nor gave the court jurisdiction of any other appeal. This is by no means the case above referred to, in which an appearance when no formal appeal had been taken, noticing it for argument, appearing in court and actually and professedly arguing the matter as an appeal, it is suggested might be deemed a waiver of notice of appeal.

But in the circumstances of this case, the question comes down to the naked inquiry whether if a respondent comes into court, with the statement at the outset that the cause comes before the court on an appeal from the judgment, and yet besides discussing numerous exceptions that are properly to be considered, argues a question whether the damages are excessive or the like, or permits the adverse party to argue among others, similar questions; he is to be deemed thereby to waive any notice of appeal from the order denying a new trial, and to give the court jurisdiction to reverse that order. We do not feel at liberty so to hold.

The order appealed from, must be affirmed.

HOFFMAN, Justice, *dissenting*.—I fully concur in the denial of the motion to dismiss the appeal taken on the 25th of May, 1858, from the order of the 13th of April, 1857, denying a new

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trial. But the decision of the appeal from the order of special term, made on the day of May, 1858, involves the question whether the court has any power to extend the time for taking an appeal from an order or judgment, or to give liberty to take it after the time prescribed in the Code has expired?

Upon this question I am compelled to differ from my brethren; and this is one of the few cases in which a deep rooted opinion upon a point of great and permanent practical consequence, appears to demand the expression of that dissent. I do not consider, and I believe it is not claimed that the opinion expressed in *Humphrey agt. Chamberlain*, (1 Kernan, 274,) controls this question. The appeal was dismissed because it was from an order not appealable. The question was not raised. The 174th section of the Code was not noticed. The 405 and 382 were alone referred to.

My reasons for this dissent, are embodied in the following propositions. 1. The Code has abolished writs of error, and substituted what is termed an appeal, as the method of reviewing orders and judgments. (§ 323.) I think that the practice upon appeals in equity cases, rather than those upon writs of error in common law actions, is to supply the rule of decision where the Code is silent. (§ 469.) Either this is the doctrine, or it is that when the action is a common law action, the rules upon writs of error shall control, and when it is an equity suit those upon appeals, as formerly known, shall govern.

2. We find one great and important principle prevailing, both as to writs of error and appeals. Writs of error were at the common law matter of absolute right in civil cases, and could be brought at any period, however remote. Appeals by the civil, the ecclesiastical, the admiralty, the law of the court of chancery, and that of the house of lords, were equally of absolute right, and equally unfettered by time. Positive statutes and positive rules were necessary to restrict the exercise of this right within definite periods, or to impose conditions upon it.

As to writs of error, there was no limitation before the statute of 10 Wm. III, c. 14. The preamble to that act recognized

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the law, "that ancient judgments were reversible at any time without restriction or limitation." It provided a remedy by limiting them to twenty years. Our own statute of 1813, (1 *R. L.* 1813, 134, § 9,) reduced the period to five years. The Revised Statutes of 1830, abridged the time to two years. (2 *R. S.* 595, § 21.) In the English act, and in our own statute of 1830, the exceptions of infancy, coverture and some others, were contained and provided for the period after the disability was removed. (11 *Wendell*, 526.)

8. In the court of chancery, appeals from a decree of the master of the rolls, were to be taken within a month by an order of court of 1725. (*Beames' Orders*, 334, 338.) This order fell into disuse. Appeals of this nature being more strictly rehearings, were taken after a much greater length of time. (1 *Merivale*, 36; 13 *Vesey*, 456.) The rule seems to have been that until a decree was enrolled, it was open to a rehearing. (1 *Daniell's Pr.* 1347, and cases.)

By the order of the 7th of August, 1852, one of those resulting from the great statutory amendments of the practice, the subject was fully regulated, and the periods for appeals and rehearings prescribed. By the 6th section of the order, the lord chancellor either sitting alone or with the lord justices, or one of them, might whenever the peculiar circumstances of the case appeared to make it just and expedient, enlarge the periods before appointed for a rehearing, appeals or enrolment. (*Headlam's Chancery Acts, &c.*, London, 1853.)

4. Appeals to the house of lords, were regulated by a standing order of March 24th, 1725. No petition of appeal was to be received after five years had expired from the signing and enrolling of the decree, and the end of fourteen days next ensuing such five years, unless the person be an infant, *feme covert*, *non compos*, imprisoned or out of the kingdom. Then within five years after the disability should cease. (*Stated at length 2 Fowler's Exch. Pr.* 246; *Palmer's Pr. House of Lords*, page .)

An order of the house, made in 1829, reduced the period of appeals to two years, and as to the exceptions, it provided that

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in no case should an appeal be allowed where the excuse was absence merely, after five years from enrolment. (1 *Daniell's Pr.* 1357.) An appeal from subsequent orders brought within five years from their date, saved an appeal from the decree, brought after five years had elapsed. Where a decree had not been enrolled, the house of lords acted upon the equity of the statute of William III, and dismissed an appeal which was brought twenty years after decree pronounced, although enrolled within five years. (*Edwards agt. Carroll*, 5 *Pr. P. C.* 466; *Smyth agt. Clay*, 6 *id.* 395, *Dublin edition.*)

5. Appeals in spiritual causes were regulated by the famous statute of 24 Henry VIII, chapter 12, prohibiting appeals to the See of Rome. From a sentence the appeal was to be taken in fifteen days, and from an interlocutory order within ten. (*Statutes at Large*, Vol. 2, p. 177; see also *Floy on Proctor's Practice*, p. 81.)

6. In admiralty I need only refer to *Brown's Admiralty Practice*, Vol. p. ; to the act of Congress of 1803, chapters 40, 52 and 54; and to *Wiscart agt. Dauchy*, (8 *Dallas*, 327.) The principle is found that appeals are of civil law origin, and the limitation to five years was prescribed for the tribunals of the United States.

7. Appeals in equity cases were regulated by the act of 1813, (1 *R. L.* 134, § 9,) adopted into the Revised Statutes of 1830, (2 *R. S.* 605, §§ 78, 79.) Appeals from final decrees were to be made within two years from enrolment, subject to the same exceptions as to persons under disability, as in cases of writs of error, and appeals from any other order within fifteen days. And the regulation of appeals from a vice-chancellor to the chancellor, was made by the statute. (2 *R. S.* 178, § 65.)

I deduce from this review two conclusions. One, that all restrictions upon the right of appeal are to be strictly construed; another and more important, that any relaxation of such restrictions is to be liberally interpreted. By the light of these principles the Code is to be examined. We notice first that the whole doctrine of exceptions by reason of a disability is

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disregarded. The prescription seems peremptory for all suits. In the next place as the Code stood in 1848, the provision was only that which we now find in the 173d section, with unimportant variations of language. The new clause of 1849, added the provision which now forms the 174th section. In it we find the direction that the court may in its discretion allow an answer or reply to be made, *or other act to be done after the time limited by this act; or by any order enlarge such time, and may also in its discretion and upon such terms as may be just, at any time within one year after notice thereof relieve a party from a judgment order or other proceeding, taken against him through mistake, inadvertence, surprise or excusable neglect.*

Thus, then, a judgment may be relieved against within a year for excusable neglect; but the power of revising that judgment under any circumstances whatever after the expiration of thirty days exists nowhere, not even when the appeal is from one judge to other judges of the same court. With the most indulgent provisions for every other imaginable case, this important common law inherent right is bounded by a period very brief in duration, and by a rule most stringent in application. It has been urged, that an appeal is a new action. With respect, I regard this position as clearly indefensible; some of my reasons are stated in *Seely agt. Prichard*. But if an appeal from an inferior to a superior tribunal could by possibility be so considered, I am unable to find a shadow of plausibility for treating a review by judges of the same court of the decision of one of them, as of that nature. It is urged that the court might as well assume the power of authorizing the commencement of action after the expiration of the periods fixed in title two of the Code. The answer appears to me to be, that the 174th section cannot, without the wildest latitude of construction, be considered as applying to any act, except such as attend and can be taken in the progress of a cause after its commencement. It has been insisted, that by just reasoning, such a power would extend to permit exceptions to the ruling of a judge at a trial, to be taken after the trial. The answer

seems to me sufficient that the time to do that is not prescribed by the Code. It must from the nature of things be taken at the trial, and so the 264th section declares ; but this is not the prescription of a definite period of days or other times for doing an act contemplated in the 174th section.

It is strongly urged that whatever was comprised in the fresh provision of 1849, it could only be treated as relating to acts proper or necessary in a cause before judgment, and that the context appeared to establish this. This perhaps might sanction the exercise of the power when the appeal was to be from an order merely. But it seems to me a better and more comprehensive answer may be given. The provision as to relieving from judgments contemplates grounds of relief distinct from the case as it stands, something extraneous, not a review of the determination on the case as made out in the court below. Besides, the 405th section has provided for such a case, conferring the power even upon a single judge of the court except as to an appeal. I draw an argument from this very section, that the power was left to the court in cases of appeals.

That inconveniences and possibly evils may result from the possession of the power in question, may not be contested. They attend every exercise of a discretionary authority lodged in a court, and yet that authority is indispensable to justice in a multitude of instances. On the other hand, little experience or little thought is needed to perceive the numerous cases in which the plainest rights will be defeated and the grossest injustice wrought, by the rigid construction of the Code upon this question. I observe in conclusion, that the case here is of an appeal from an order denying a motion for a new trial, and the right of a judge of the court, in court, to extend the time for taking such an appeal. It is the decision on this point that I differ from. My reasoning would equally support the power in case of a judgment of the special term sought to be appealed from. I say nothing upon the point of an appeal from the general term to the court of appeals.

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SUPERIOR COURT.

FRY, Respondent agt. BENNETT, Appellant.

On appeals from a single judge to the general term, the Code (§ 332) requires the appeal to "be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing."

Therefore, *held*, that unless after the order is made or judgment rendered and entered, or filed and constructively entered, so as to become a part of the record or minutes of the court, the party has some *written notification thereof by act of the prevailing party or his attorney*, his time to appeal continues without limitation.

The party may acquire knowledge of the order, he may examine it on the files of the court, or on its records, or procure a copy of it from the clerk, and for many purposes, this and any actual knowledge of the order or judgment will be notice, but as a *limitation of the time to appeal*, knowledge so acquired will be wholly inoperative.

General Term, Saturday June 19th, 1858.

Before BOSWORTH, HOFFMAN, SLOSSON, WOODRUFF and PIERREPONT, Justices.

MOTION to dismiss appeal from order denying motion for a new trial.

A motion for a new trial was made in this action before one of the justices at special term, and without argument, he decided to deny the motion. On the 18th day of April, 1857, the counsel for the parties appeared before the judge, for the purpose of settling the order. A draft of the order was prepared and submitted by the defendant's counsel, and it was approved. The plaintiff's counsel made a copy thereof, and the judge indorsed upon the draft a direction to the clerk to enter the order and signed that direction. The counsel for the plaintiff took upon the copy made by himself, the clerk's certificate that it was a copy, and the counsel respectively left. The defendant's counsel taking the draft, and the plaintiff's counsel taking the copy. Afterwards, having made a transcript of the copy so certified, the counsel for the plaintiff obtained from the judge a direction thereon to the clerk to enter the order.

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To this stage in the proceedings no order had been filed or entered with the clerk, but the next day, April 14th, the plaintiff's attorney filed the transcript made as above stated, with the clerk, and in pursuance of the directions thereon indorsed, he entered it in the minutes. The plaintiff's attorney then entered up his judgment, and gave notice that judgment was entered. The defendant appealed from the judgment, and on printing his case for use on the appeal, he printed the judgment, which recited in terms the order denying the motion for a new trial. The appeal from the judgment was brought to argument in December, 1857. The question afterwards arose, before any decision of that appeal, whether an appeal had been taken from the order denying a new trial?

After a motion had been made by the defendant to amend his notice of appeal from the judgment, he on the 25th of May, 1858, served a formal notice of appeal from the order of the 13th of April, 1857, denying the motion for a new trial, insisting that written notice of that order had not been given to him, and, therefore, that the time within which an appeal must by the provisions of section 332 of the Code of Procedure, be taken, had not expired, nor indeed ever began to run. The plaintiff thereupon moves to dismiss the appeal so taken, on the ground that the time for appealing has long since expired; that the circumstances above detailed amount to the giving of written notice, and that no actual *service by him* of any copy of the order or written notice thereof was necessary.

F. R. SHERMAN, *for the respondent, in support of the motion.*

D. D. FIELD, *for the appellant, contra.*

By the court—WOODRUFF, Justice. That provision of the Code of Procedure, which limits the time within which an appeal must be taken, is wisely enacted in order that litigation may be terminated. That as other statutes prescribe the time within which causes of action must be prosecuted, and still others provide compulsory means by which the progress of the controversy may by either party be hastened to judgment, so

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that by means of this limitation further litigation by appeal from court to court, may be finally terminated. And in providing this last means of determining the matter finally, and as the case may be, debarring the unsuccessful litigant of any review or reconsideration of the matters which have once been adjudged against him, the framers of the law have, we think, had a two-fold purpose before their minds. *First*, to make the condition of the limitation so plain that there should be no danger of misconstruction or misapprehension. And, *second*, to place it in the power of the prevailing party to set the time a running within which an appeal shall be taken, whenever he may choose. By this means each party is placed in a situation to know distinctly and clearly what is the actual state of the controversy in this respect. The losing party will not be taken at unawares and be deprived of a right of review, and the prevailing party will know precisely when the right of review is waived or lost.

It is with this two-fold purpose, we think, that it is provided by section 332 of the Code of Procedure, that the appeal from the special to the general term, "must be taken within thirty days after *written notice* of the judgment or order *shall have been given* to the party appealing." Upon this we observe that in order that the thirty days shall begin to run, that it is not enough that the party have notice of the order. That was conceded on the argument of the present motion. No oral communication, therefore, is sufficient. No presence in court and hearing the decision announced on the order or judgment declared by the court is sufficient. He must have *written notice*. Again; we deem it equally clear, that the written notice which is to avail to limit the time, must be such as to apprise him fully of the whole substance, if not the very details of the order or judgment given or made against him. Without this, he is not in a situation to determine whether he will appeal or not. He can, without such notice, make no election. Further, the notice he receives must come to him from an authentic source, else he is in no manner bound to rely upon it or take any action founded thereon. The attorney for the adverse party is the per-

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son to whom he is to look for all notices in the progress of the cause, and he is not bound to receive or regard any others, unless it be such as contemplate the displacement of such attorney or the employment of a new attorney. The notice is to be *given to him*, which in our judgment plainly means that it shall be served upon him.

All this is simple, easily understood; it enables the party to see and apprehend his precise condition in reference to the subject. And on the other hand, it leaves the prevailing party at full liberty to set the thirty days a running when he pleases, or to acquiesce in or allow an unlimited time within which to appeal, if he choose to do so. We think that the term *notice* in this statute, has a meaning in some degree technical. That in its connection it imports something written and *given* to the party for the very purpose of apprising him of the judgment or order. And that it was intended to mean this in order to prevent the uncertainty and conflict which would result from allowing the limitation to depend on the question whether the party had ever *seen* the *order* or *judgment*, or a copy thereof, or upon any similar questions.

It is unnecessary for us to say, and we do not intend here to say, whether if the party prevailing, issue execution and that execution be exhibited to the other party by the sheriff, and is levied, that that would or would not be a sufficient notice. Nor whether if the party prevailing, actually serve upon the other a copy of the order or judgment, duly certified by the clerk of the court without further authentication, that would or would not be a sufficient notice.

But we do intend to hold, that unless after the order is made or judgment rendered and entered, or filed and constructively entered, so as to become a part of the record or minutes of the court, he has some written notification thereof, by act of the prevailing party or his attorney, his time to appeal continues without limitation. He may acquire knowledge of the order, he may examine it on the files of the court, or on its records, or procure a copy of it from the clerk. For many purposes, this and any actual knowledge of the order or judg-

ment will be notice, but as a limitation of the time to appeal, knowledge so acquired will be wholly inoperative.

There is nothing novel in this view of the subject. By the provisions of the Revised Statutes relating to appeals to and from the court of chancery, different rules were made in relation to different appeals, some must be taken within a certain time after the decree was entered in the minutes of the court; e. g. appeal from vice-chancellor to chancellor, for a final decree. (2 *Rev. Stat.* 178, § 98.) Another from the time the decree shall have been *recorded*; e. g. from a decree of surrogate on final settlement of accounts. (2 *Rev. Stat.* 610, § 105.) Others from the time the order, sentence or decree shall have been made; e. g. appeals from surrogates not specially provided for. (2 *Rev. Stat.* 610, § 107.) Appeals from final decrees of the court of chancery to courts of error, from the time of the enrolment. (2 *Rev. Stat.* 605, § 78.) From an interlocutory order of a vice-chancellor, within fifteen days after notice of such order. (2 *Rev. Stat.* 178, § 98.) And what is expressly applicable to the point under consideration, all appeals from any other order or decree of the court of chancery, (except final decrees,) to the court of errors, must be made "within fifteen days after notice thereof shall *have been given* to the party against whom such order or decree shall be made, or to his solicitor." (2 *Rev. Stat.* 605, § 79.) The construction of this language came under consideration in the court for the correction of errors, in *Jenkins agt. Wild*, (14 *Wend.* 545,) and we have done little more than borrow the language of Chief Justice SAVAGE, in giving the opinion in that case. "It is notice to be *given*," &c. "This implies a *positive act* of the party in whose favor the decree is made." * * "It is clear to my mind, that the legislature intended a *regular formal written notice*," &c. (See also 2 *Hoff. Chy. Pract.* 20; *Tyler agt. Simmons*, 6 *Paige R.* 182; *The People agt. Backus*, 9 *id.* 607.)

The application of these views to the motion before us, is obvious. The motion to dismiss the appeal must be denied.

SUPREME COURT.

ALFRED BUCKHOUT agt. JOSEPH HUNT, executor, &c.

An executor (or administrator) stands in the position of a trustee, not as a debtor, in respect to the creditors of the estate. And like all trustees where the names of the *cestuis que trust* are not given in the deed, he is bound to exercise the utmost care and circumspection before he accepts a claim as entitled to payment from the estate, and the law will afford him all reasonable means for so doing. He cannot be coerced to pay debts short of a year from the time of granting the letters, because the various statutory provisions made for the protection of the estate, cannot be executed short of that time.

The remedies of the creditor, in the meantime, however, are not absolutely suspended: he may prosecute his action, but he must do so at his own costs and expense, and not at the costs and expense of the estate, unless he can show that the executor has been guilty of some laches or illegal act in regard to the adjustment of his claim.

To entitle a plaintiff to charge an executor (defendant) with the costs of the action, he must establish to the satisfaction of the court, 1st. That the demand was unreasonably neglected, or 2d. That it was unreasonably resisted, or 3d. That the defendant refused to refer the matter in controversy to three disinterested persons, pursuant to the provisions of (§ 36) the Revised Statutes.

In this case *held*, that it was a complete answer, (as it would be in any case,) to any suggestion of unreasonable neglect on the part of the executor, that the demand was exhibited to him just thirty-four days from the time of issuing the letters, and was prosecuted just fifteen days after its presentation, and especially as the first item was rather an unusual one in an account current, and not calculated to bespeak the confidence of the executor, and assure him of its entire accuracy, to wit: "\$5,000 for personal services as a nurse."

The executor being prosecuted with indecent haste, and before he had time to turn round, had no alternative but resistance; to resist to the utmost was manifestly his duty, and a suggestion of unreasonable resistance could not be supported, although the referees in their report of the trial of the cause certified that the claim was unreasonably resisted. As to that matter, the referees entered into a province which had not been assigned to them.

Besides, it has been settled by a series of decisions in this court, that when a claim against the estate is materially reduced upon the trial, (as this was, over \$2,000,) the resistance offered by the executor is not unreasonable.

Before a claim can be referred, and before there is any cause for its reference, it must have been disputed or rejected, and until the latter occurrence the claim is not in a condition to propose a reference. A rejection of the claim, therefore, is not equivalent to a refusal to refer. They are different and independent acts.

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The proposition to refer must proceed from the claimant after his claim has been rejected; and unless such a proposition appears affirmatively, he is not entitled to costs against the executor personally, or against the estate.

Orange Special Term, November, 1858.

MOTION by plaintiff for costs of action on judgment entered upon report of referees, and for an extra allowance.

FRANCIS LARKIN, *for the plaintiff.*

WAKEMAN & LATTING, *for defendants.*

BROWN, Justice. The defendant is the executor of the last will and testament of Augustus Hunt, who died on the 30th of January, 1857. The will was proved and letters thereon granted to the defendant on the 25th day of February thereafter. On the 31st of March ensuing, the plaintiff presented his claim to the executor duly verified, and demanded payment. The affidavits are in conflict with regard to what occurred on the presentation of the bill, but I assume for the purposes of the motion, that it was disputed and payment refused. It consisted of thirty-one items, the first of which was \$5,000 for personal services as a nurse, rendered from November 1st, 1854, to January 30th, 1857, giving no particulars. The other items were for money expended on the testator's account, amounting in all to the sum of \$374.75. On the 15th of April, 1857, the plaintiff commenced his action in this court by the service of a summons and complaint, claiming to recover \$5,374.75 with the interest. The defendant put in his answer denying the allegations in the complaint, and the action was referred upon the motion of the plaintiff's attorney, to Thomas McKissock, Selah Squires and Robert Cochrane, Esquires. On the 2d of December, 1857, the referees made their report, in which they find \$2,938 due to the plaintiff for the first item in the bill, and \$156.58 for the other charges, thus reducing the plaintiff's claim more than \$2,000. The referees also certify in their report, that the claim was duly presented, and that it was unreasonably resisted by the defend-

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ant. The referees afterwards furnished a further certificate, in which they say they were occupied fifteen days in the trial of the action, that it was difficult and extraordinary, and that in their opinion a further allowance of 5 per cent. upon the recovery of the plaintiff, would be reasonable and proper. Upon the report of the referees, the plaintiff entered up his judgment, without any order or direction of the court in regard to the costs, as well for the sums found due to him as for the costs of the action. His judgment was subsequently set aside as irregular. In the meantime the defendant obtained an order for a more specific report from the referees, which they have accordingly made, charging as their fees for making the same, the further sum of \$80. The plaintiff now moves for an order granting him the costs of the action, and for an extra allowance under section 308 of the Code, and that the defendant accept the supplemental report from the referees and pay them their charges for making the same.

Three months from the time of granting the letters, are given by the statute for an executor or administrator to prepare and file an inventory of the personal estate of the deceased. And after the lapse of six months from the time of granting the letters, he may give public notice for persons having claims, to exhibit the same to him with the vouchers, at or before a day to be specified in the notice, which shall be at least six months from the day of the first publication of the notice. The claims are to be presented not for immediate but for ultimate payment, if the assets prove sufficient, and if insufficient, for a rateable proportion of whatever there may be. In respect to the creditors, the executor does not maintain the relation of debtor. His position is that of trustee to collect and hold the estate, and after he has ascertained who are the creditors, legatees and next of kin, to apply it in satisfaction of their claims, in the order prescribed by law. Like all trustees where the names of the *cestuis que trust* are not given in the deed, he is bound to exercise the utmost care and circumspection before he accepts a claim as entitled to payment from the estate; and the law will afford him all reasonable means for

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so doing. He cannot be coerced to pay debts short of a year from the time of granting the letters, because the various statutory provisions made for the protection of the estate, cannot be executed short of that time. In the meantime the remedies of the creditor are not absolutely suspended. He may prosecute his action, but he must do so at his own cost and expense, and not at the cost and expense of the estate, unless he can show that the executor has been guilty of some laches or illegal act in regard to the adjustment of his claim. When the claim is presented, the executor may require that it shall be verified by the oath of the creditor, and if he still doubts its justice, he may enter into an agreement in writing with the claimant to refer the matter in controversy to three referees, to be approved of by the surrogate. Section 41 of the act in regard to the duties of executors and administrators, in the payment of debts, legacies, &c., (2 *Rev. Stat.* 30, 2d ed.,) provides that no "costs shall be recovered in any suit at law against any executors or administrators, to be levied of their property or of the property of the deceased, unless it appear that the demand on which the action was founded was presented within the time aforesaid, and that its payment was unreasonably resisted or neglected, or that the defendant refused to refer the same," pursuant to the provision to which I have referred. "The time aforesaid," doubtless means the six months given to the creditors to present their claims in pursuance of the notice to be published under section 34 of the act. When the claim in this action was presented, the time had not arrived when the executor was at liberty to give the requisite notice, and the counsel for the defendant insists that there has been no presentation of the claim within the meaning of the act. In this view I do not concur. The object of the notice is to put the executor in possession of all the claims against the estate, and furnish him with a knowledge of their nature and amount, and to protect him whenever he proceeds to distribute the estate among the creditors who have presented their claims, and the legatees and next of kin. This is evident I think from an examination of the provisions of sec-

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tions 34, 39, 40 and 42. This object is fully attained if the claim be exhibited to and left with the executor at any time after the granting of the letters, and before he proceeds to pay out and distribute the estate.

To entitle the plaintiff to charge the defendant with the costs of the action, he must establish to the satisfaction of the court, 1st. That the demand was unreasonably neglected, or 2d. That it was unreasonably resisted, or 3d. That the defendant refused to refer the matter in controversy to three disinterested persons, pursuant to the provisions of section 36. It is a complete answer to any suggestion of unreasonable neglect to say what cannot be disputed, that the demand was exhibited to the executor just thirty-four days from the time of issuing the letters, and was prosecuted just fifteen days after its presentation. The presumption is that the defendant was a stranger to the transactions out of which the debt arose, and had no other knowledge of them, except such as the claim itself disclosed, and such as he could collect after the demand was made. The first item was not calculated to bespeak his confidence and assure him of its entire accuracy. A single charge of \$5,000 due to one man for nursing another, is rather an unusual item in an account current. Until there was time for inquiry and examination into the circumstances upon which a charge so novel and extraordinary was founded, there was no room to impute neglect.

The suggestion of unreasonable resistance is equally unsupported. Prosecuted as the executor was with indecent haste, and before he had time to turn round, he had no alternative but resistance. To resist to the utmost, was manifestly his duty. The referees, it is true, have certified in their report that the claim was unreasonably resisted. But the degree of resistance which the executor might reasonably oppose to such a claim prosecuted under such circumstances was not one of the questions committed to them for determination. And in certifying such a fact, I respectfully submit they entered a province which had not been assigned to them. (*Carhart agt.*

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Blaisdell's executors, 18 *Wend.* 581; *Gansevoort agt. Nelson*, 6 *Hill*, 389; *Comstock agt. Olmstead*, 6 *How. Pr. Rep.* 79.)

Besides, it has been settled by a series of decisions in this court, that when a claim against the estate of a deceased debtor is materially reduced upon the trial, the resistance offered by the executor is not unreasonable. (*Roberts agt. Ditmars*, 7 *Wend.* 522; *Carhart agt. Blaisdell's Ex'rs*; *Comstock agt. Olmstead*, *supra*; *Bullock agt. Bogardus*, 1 *Denio*, 276.)

In the present action, the claim of the plaintiff was reduced more than \$2,000. So that upon the authorities referred to, the resistance was entirely reasonable and right, and such as the executor could not for any cause omit to offer. In regard to the refusal to refer, the affidavits do not show that a reference of the plaintiff's claim was at any time the subject of conversation or negotiation between the plaintiff and defendant, or any person representing them. Indeed, it is not pretended that the plaintiff ever proposed or offered to refer the claim in controversy. He relies solely upon the proposition that a rejection of the claim is equivalent to a refusal to refer. The authority for this construction is *Fort agt. Gooding*, (9 *Barb. S. C. Rep.* 388,) where Mr. Justice WILLARD held that an unqualified rejection of a claim unaccompanied by an offer to refer, was equivalent to a refusal to refer. This construction is unsupported by any authority, and has not been followed by any other judge. The authorities seem to be all the other way. (*Swift agt. Blair's Executors*, 12 *Wend.* 278; *Hawley agt. Skillman's Executors*, 22 *Wend.* 571; *Stephens agt. Clark*, 12 *How. Pr. R.* 282; *Proude agt. Whiton*, 15 *How. Pr. R.* 304,) which last case was affirmed upon appeal to the general term. The rejection of the claim and a refusal to refer are different acts entirely independent, and the one cannot by any logical construction be deemed the equivalent of the other. Before a claim can be referred, and before there is any cause for its reference, it must have been disputed or rejected, and until this latter occurrence the claimant is not in a condition to propose a reference. To say that a rejection of the claim is also to be deemed a refusal to refer, is to say what the executor

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may not by any means intend, and to involve the estate in the expenses of a litigation, which he may have every disposition to avoid. A refusal to do an act, implies that there has been a previous request, and a refusal to refer a rejected claim to three disinterested persons, implies a previous request or offer to refer by the claimant. The proposition to refer must proceed from the claimant after his claim has been rejected. The statute admits of no other construction. To entitle the plaintiff, therefore, to an order charging the costs in this action to the defendant personally, or to the estate which he represents, it must appear affirmatively that he made a proposition or offer to the defendant to refer the subject in controversy to three disinterested persons, to be approved by the surrogate, and that such proposition or offer was refused. The papers, in my judgment, show nothing of the kind.

The stipulation that the referees shall each receive \$10 per day as a compensation for their services, relates exclusively to the measure of their compensation, and does not affect the executors' liability. The second and third branches of the plaintiff's motion must fall with the first, because the costs signify all the plaintiff's taxable fees and disbursements, and unless the defendant is liable for all, he is not liable for a part.

The plaintiff's motion is denied, with ten dollars costs of opposing the motion.

SUPREME COURT.

SCHADLE agt. CHASE.

Although a person cannot be *arrested* more than once by process out of different courts in the same state, for the same cause of action, the rule does not apply where the first process is absolutely *void* by reason of want of authority on the part of the court or officer who issued it.

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Neither the marine court of the city of New-York, nor any of its judges, possess any power to issue an order of arrest under section 179 of the Code.

Where the defendant received as agent or attorney of the plaintiff, a specific sum of money for the specific purpose of paying it over to a certain insurance company, for interest and insurance due to them by the plaintiff, and while the money was in the defendant's hands, the plaintiff demanded it back, and the defendant refused to pay it back, on the ground that the plaintiff had agreed in consideration of the performance of certain conditions by a third person, which was then in progress, the defendant might pay a portion of the money to such third person, and that by paying the money back to the plaintiff it would be violating such agreement, and the plaintiff thereupon procured an order of arrest for the defendant;

Held, that although the defendant might not have acted in bad faith, or was guilty intentionally of any breach of trust, yet he was legally bound to refund the money to the plaintiff when he demanded it; he was merely the agent of the plaintiff, who had a right to dispense with such agency at any time. Motion to discharge arrest denied.

New-York Special Term, October, 1858.

MOTION to vacate order of arrest. The facts will sufficiently appear in the opinion.

CLERKE, Justice. A person cannot undoubtedly be arrested more than once by process out of different courts in the same state, for the same cause of action; but this maxim does not apply where the first process is absolutely void by reason of want of authority on the part of the court or officer who issued it. The marine court, in the case under consideration, had jurisdiction of the subject matter of the action, but neither the court nor any of its judges, possess any power to issue an order of arrest under section 179 of the Code; and it was under the second subdivision of that section, that the judge of the marine court issued the order, by virtue of which the defendant was first arrested. On reference to section eight of the Code, it will be seen that the last eleven titles of the second part of the Code apply exclusively to actions in the supreme court, and other courts expressly enumerated; among which the marine court is not mentioned. The order was, therefore, null and void, and the plaintiff had a right on discontinuing his action in the marine court to institute one here,

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and to obtain a new order of arrest from a judge of this court. The only question therefore is, do the facts and circumstances of the case, entitle him to the order? It is admitted by the defendant that he received as agent or attorney of the plaintiff, the sum of \$274.50, for the specific purpose of paying it to the Mutual Insurance Company for interest and insurance, due to them by the plaintiff. This was the precise amount due by him to the company. But the defendant alleges that after he received this amount, the plaintiff agreed if Mr. Sandford, his attorney in an action pending in the supreme court, would procure an order in that court, allowing the application of certain moneys deposited therein, to the payment of the claim of the Mutual Insurance Company, that the plaintiff would allow to Mr. Sandford the amount of his bill out of the money in the defendant's hands. Afterwards, however, and while Mr. Sandford was taking the necessary steps to procure the order in the supreme court, the plaintiff called upon the defendant and demanded that he should refund the money which he had deposited with him to pay the insurance company. This the defendant refused, on the ground that the plaintiff had made the agreement with Mr. Sandford, and in consequence of this refusal, he has been arrested in this action.

Although I do not believe the defendant acted in bad faith, or was guilty intentionally of any breach of trust, yet I think he was legally bound to refund the money to the plaintiff whenever he demanded it. The defendant was not a stakeholder, he was under no legal liability to retain the money, either for Mr. Sandford or the insurance company; he was merely the agent of the plaintiff, who had a perfect right to reclaim his money at any time before it was actually paid over to either of them. He had a right to dispense with the agency and services of the defendant in the premises at any time; and if he neglected to satisfy the claim of the insurance company, or violate his agreement with Mr. Sandford, he alone and not the defendant, was amenable to them. The defendant was only the custodian of the fund, he was in no respect a party to

the agreement with Mr. Sandford, and certainly had not incurred any legal obligation to the insurance company.

It appears that the receipt which the defendant first drew on receiving the money from the plaintiff, specified the purpose to which it should be applied, with the words, "*subject only to his fees and disbursements.*" The plaintiff positively swears that these words were erased on his objecting to them, before the receipt was delivered to him; while the defendant as positively swears that they were retained, and that the plaintiff must have erased them afterwards. However this may be, it is quite clear that the money consisted of the precise sum due to the insurance company, and that it was deposited with the defendant for that purpose alone. The designated words therefore, seem to be quite at variance with the purpose for which the money was intrusted to the defendant. At the time the plaintiff demanded the restoration of the money, the defendant did not place his refusal on the ground that he had any lien upon it; but purely on the ground that he would be acting "wrongly to Mr. Sandford and to the insurance company," by surrendering it.

The defendant, consequently, under no aspect of the case was legally justified in withholding the money, and as he received it as an agent, he has made himself liable to arrest under the second division of section 179 of the Code, for not restoring it to his principal, when he demanded it.

The motion to vacate the order of arrest, must be denied, but as I do not think the defendant was guilty of bad faith, I will not allow costs.

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SUPREME COURT.

JAMES H. GREGORY agt. CYRUS N. CAMPBELL and others.

On an order of *reference* in a mortgage foreclosure case, the first duty of the referee under the statute, aside from computing the amount due on the mortgage, is to ascertain whether the mortgaged premises are so situated that they can be sold in parcels without injury to the interests of the parties. So far as the duty of the referee is concerned under this branch of the order of reference, the inquiry is simply how can the mortgaged premises be sold so as to realize therefrom the greatest amount of money?

A sale of the whole premises in one parcel can only be *most beneficial to the parties*, when the mortgagee will receive and the mortgagor pay from the sale thereof the largest amount of the mortgage debt, and leave the largest surplus after payment of the whole debt. The benefit mentioned and intended by the statute is a benefit *common to both parties*.

The report of the referee in such cases is but part of the evidence before the court and upon which it is called upon to decide whether it will or will not be most beneficial to the parties to decree a sale of the whole premises in one parcel in the first instance. The court will look to the pleadings, and will receive other evidence in its discretion, and will consider any stipulations, offers and admissions of the parties or of other persons presented to it on the hearing.

Where it appeared to the court that the mortgaged premises consisted of about 150 acres of land mostly within the limits of the city of Rochester, and was laid out for the most part into city lots, intersected by streets, and upon the map consisted of a variety of distinct blocks of ground, and that the bond and mortgage, (which were given to secure purchase money,) were given to secure the sum of \$35,920, of which only the sum of \$2,592.08 was due and payable, the residue being payable in instalments running through a period of about fourteen years. And the evidence before the referee and otherwise, being quite conclusive that eligible sales for cash in hand of said lands in parcels large or small, could not then be made at a forced sale. And the fact that the plaintiff then tendered a stipulation to bid on the sale in one parcel the whole amount of principal and interest due, and to become due on the bond and mortgage with costs, so as to leave no deficiency for which the defendants would be responsible.

Held, that the case came within the statute, and within the case in 1 *Paige*, 450, making it the duty of the court to decree a sale of the whole premises in one parcel, as most beneficial to the parties.

Monroe Special Term, July, 1858.

FORECLOSURE.

The issues of fact presented by the pleadings had been tried

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at a previous term, before Justice JOHNSON, and found in favor of the plaintiff, and an interlocutory decree made by him referring it to a referee to compute the amount due upon the bond and mortgage, and ascertain the situation of the mortgaged premises in the usual manner of such orders.

The referee had made his report to which the defendant's counsel had duly excepted. The cause was put upon the calendar for the special term and duly noticed for hearing. When reached in its order on the calendar, the plaintiff moved for a decree on the referee's report, and would stipulate to bid the amount reported due by the referee in case the premises were sold in one parcel. The counsel for the defendant presented several offers from different persons to bid on distinct parcels of the land, provided the premises were sold in parcels, and also brought on the exceptions to the referee's report for argument. And the same having been duly argued at a subsequent day in the term, such exceptions were overruled and a decree ordered for the plaintiff.

The points presented by the exceptions and upon the proofs taken by the referee, will sufficiently appear in the opinion.

M. S. NEWTON, *for plaintiff.*

S. MATHEWS, *for defendants.*

E. DARWIN SMITH, Justice. Under orders of reference in cases like this, aside from computing the amount due on the mortgage, the first duty of the referee is to ascertain whether the mortgaged premises are so situated that they can be sold in parcels, without injury to the interests of the parties. (*Sec. 164 of article 6, chap. 1, part 3 of the Revised Statutes.*)

This provision of the statute relates entirely to the material condition of the mortgaged property. If the referee finds that the property cannot be sold in parcels, as he would be bound to do, in cases where it is indivisible for use or enjoyment, as in the case of a mill, a store, a dwelling-house or a farm, or single piece of property, whose value consisted in keeping it together in its unity or entirety, such finding will practically

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end his duties under the order. And so it will be if he finds that the mortgaged premises consists of distinct parcels of land, whose relative value is entirely independent of each other. In such cases he will so report, and the land must be sold accordingly.

But if he finds that the mortgaged premises consist of a large tract of land, he will then inquire whether such tract can be subdivided and sold in distinct parcels without impairing its aggregate value, and if so in what parcels, or whether the premises are so situated that the sale of the whole in one parcel will be most beneficial to the parties. So far as the duty of the referee is concerned, under this branch of the order of reference, the inquiry is simply how can the mortgaged premises be sold so as to realize therefrom the greatest amount of money? The statute, (*Sec. 165 of the act aforesaid*), can have no other meaning. A sale of the whole premises in one parcel can only be *most beneficial to the parties*, when the mortgagee will receive, and the mortgagor pay from the sale thereof the largest amount of the mortgage debt and leave the largest surplus after payment of the whole debt. The benefit mentioned and intended by the statute, is a benefit *common to both parties* in this single respect. Nothing is referred to a referee under these orders of reference except the questions relating exclusively to the material situation of the mortgaged premises, and how the same can be most advantageously sold, having reference to its condition, the demand for such property, and its relative value and saleableness in the market in the locality where it is situated. The report of the referee is but part of the evidence before the court, and upon which it is called upon to decide whether it will or will not be most beneficial to the parties to decree a sale of the whole premises in one parcel in the first instance. The court will look to the pleadings, and will receive other evidence in its discretion, and will consider any stipulations offered, and admissions of the parties, or of other persons presented to it on the hearing.

The referee in this case finds that the mortgaged premises

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might be sold in parcels without injury to the value of the land, and is of the opinion that they should be sold together, for the reasons stated. The reasons stated do not strictly apply to the questions pending before the referee, that is to say, how the land can be sold to produce the most money, whether in parcels or as a whole? From the report of the referee, and the evidence received by him, it appears that the mortgaged premises consist of about 150 acres of land, mostly within the limits of the city of Rochester. They are laid out for the most part into city lots, intersected by streets, and upon the map exhibited, consist of a variety of distinct blocks of ground. The land was sold to the defendant, it appears, originally in one parcel, but it had then been partly plotted into city lots.

If the amount secured by the bond and mortgage in this case was all due, I cannot think that any court would be warranted in decreeing a sale of the whole premises in one parcel under the proofs before the referee.

But it appears that there is secured by this mortgage, and remaining unpaid to the plaintiff thereon, the sum of \$35,920, of which only the sum of \$2,592.08 is now due and payable. The residue being payable in instalments, running through a period of about fourteen years from its date. The property was obviously purchased and sold with the view to the resale of the same by the defendants in small parcels for city lots, for the plaintiff bound himself to receive in payment bonds and mortgages upon small parcels of said land, not to be for a smaller sum than \$200 each, nor having over fourteen years to run, and to execute releases of the property sold.

From this source, it was doubtless expected that the mortgage debt was to be paid. In view of these facts, it is impossible to say that these lands cannot be sold in parcels so far as relates to the situation and use of the property. The difficulty, if any, lies in the want of demand for the land in such parcels, or a demand to such an extent as will make it the duty of the court to require the same to be so sold. All the plaintiff is entitled to is to receive his pay upon the mortgage in cash, as the

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payments fall due. If parcels of this land can be sold for cash sufficient to pay the amount now due to the plaintiff, without impairing his security for the balance of his debt, or the relative value of the residue of the land, it ought to be so sold, and the court cannot hold that it will be most beneficial for the parties to sell the whole land in one parcel. And this it strikes me, was the chief matter for inquiry before the referee, since if the premises are sold in parcels, no more can be sold now than will be sufficient to pay the amount now due, while if the same are sold in one parcel the whole debt must be at once paid. No proof seems to have been given before the referee, that specific parcels of the mortgaged premises, or any particular number of parcels, could now be sold for cash, sufficient to raise the amount now due to the plaintiff. If such proof had been offered, it would have been the duty of the referee to have inquired and reported whether the sale of such parcels could be made without prejudice to the relative values of the residue of the property, or to the security of the plaintiff for the residue of his debt. If it had appeared that such parcels might be so sold, but that it would take the choicest selections or portions of the mortgaged premises to raise the amount of money now due to the plaintiff, then it would not be beneficial to the parties to order such sale, as it would obviously jeopardize the ultimate payment of the whole debt, as the referee finds that the defendants are insolvent, and that the whole mortgage property is now an inadequate security for the whole debt, and that the land cannot now be sold in parcels or as a whole, without a great sacrifice upon its nominal value. The fact that the defendants have had the right for about two years to sell the land in parcels, and on long credit and apply the proceeds, if in the shape of bonds and mortgages, to the amount of \$200, in payment of the purchase money, and have made no sales and have suffered the mortgage to be foreclosed for an instalment of \$2,500, would seem to furnish quite conclusive evidence that eligible sales for cash in hand of said lands in parcels large or small, cannot now be made at a forced sale.

These facts, in connection with the fact that the plaintiff now

Struver agt. The Ocean Insurance Company.

tenders a stipulation to bid on the sale of the said premises in one parcel, the whole amount of principal and interest due and to become due on said bond and mortgage, with costs so as to leave no deficiency for which the defendants will be responsible, seems to me to bring the case within the statute, and within the case in 1 *Paige*, 450, making it the duty of the court to decree a sale of the whole premises in one parcel, as most beneficial to the parties.

The defendants present, it is true, some offers to purchase particular parcels, but these should have been made to the referee, so that he might have inquired whether the persons making such offers were responsible persons, and whether the land proposed to be purchased by them, could properly be separated and sold within the principles above stated; which I think so improbable that I do not think it expedient to send down the case to the referee for further examination.

The exceptions to the report of the referee must, therefore, be disallowed, and the said report confirmed, and a decree for the sale of the whole premises in one parcel be made accordingly.

Decree accordingly.

SUPREME COURT.

STRUVER and others agt. THE OCEAN INSURANCE COMPANY.

In order to ascertain and determine whether a defence is a *demurrer* or an *answer*, it is only necessary to ascertain whether it requires that any facts should be *proved* or not.

A defect in a complaint may arise from having too many or too few *parties*; and either defect appearing on the face of the complaint is the subject of *demurrer*.

Where the defendants in a portion of their answer took the objection of a want of parties in the complaint, *held* that it must be considered as a *demurrer*, and as they could not answer and demur to the same count in the complaint, they must elect which they would abide by.

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New-York Special Term, October, 1858.

MOTION to compel defendants to elect whether they will rely upon their answer or demurrer.

CLERKE, Justice. To determine whether a defence is a demurrer or an answer, it is only necessary to ascertain whether it requires that any facts should be *proved* or not. If it can be gathered from the face of the complaint that the facts set up in the defence are not controverted, then of course, there are no facts to be proved; and nothing is left for the court but to decide the legal principles deducible from the uncontroverted facts. In order to ascertain from the face of the complaint, whether the facts set up in the defence are the subject of dispute or not, it is not necessary that they should be affirmatively alleged in the complaint, this may be ascertained from the absence of the alleged essential materials to enable the plaintiff to maintain his action, as well as from express categorical statements. A defect evidently, in short, in a complaint, may arise from having too many or too few parties; and this defect from either cause, is according to the Code, one of the enumerated grounds of demurrer.

The objections taken by the defendants in the latter part of their defence, are of this character; the defect appears on the face of the complaint, the want of parties is the ground of the objection, this absence of parties whom the defendants maintain to be essential, is uncontroverted; there are no facts to be proved.

This portion of the defence is, therefore, a demurrer; and as a defendant cannot answer and demur to the same count of a complaint, the defendants in this action must elect whether they will abide by their answer or by the demurrer.

Motion granted, with \$10 costs.

Drury agt. Clark.

SUPREME COURT.

SAMUEL DRURY, Respondent agt. WILLIAM H. CLARK and
WIFE, impleaded, &c., Appellant.

In a *mortgage foreclosure* case, the general allegation in the complaint that the defendants (those designated) have or claim some interest in, or lien upon the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, is a sufficient statement of a cause of action against such defendants.

That is, the plaintiff is not compelled to state a variety of issues to different defendants; issues in which he has no interest, and to await their determination among the defendants whom he is bound to make parties. Such defendants are only interested in the eventual surplus, if any, and their respective interests are material only among themselves, and not to the plaintiff.

Where the equity of redemption is stated in the complaint to have been conveyed by the mortgagor to one of the defendants who is made a party, as claiming some interest subsequent to the mortgage, who assumed and covenanted to pay the mortgage as part of the consideration of the conveyance which he received; the mortgaged premises are, therefore, the primary fund for the payment of the debt, and after them the defendant thus covenanting, is next liable; and his grantor stands in the position of surety as to such defendant.

Therefore, where the mortgagee asks a personal judgment only against such defendant, as the owner of the equity of redemption, it is not necessary that the mortgagor be made a party to the foreclosure. It is only when the party, against whom the mortgagee asks a personal judgment for any deficiency, is a mere surety of the mortgagor that it can be insisted that the latter should be made a party, and the plaintiff's remedy exhausted against him for any deficiency in the lands, before resorting to his surety.

It is well settled that a grantee of mortgaged premises, who has assumed the payment of the mortgage, is a proper party to a foreclosure, and can be made liable on such a covenant.

Kings General Term, October, 1857.

S. B. STRONG, BIRDSEYE and EMOTT, *Justices.*

THE complaint in this action showed by its allegations that Daniel Richards, for the purpose of securing the payment to Edward Belknap, of the sum of \$4,755, with interest thereon, on or about the first day of March, 1850, executed and delivered to said Belknap, a bond bearing date on that day, in the penalty of \$9,510, on condition that the same should be void if the said Daniel Richards should pay to the said Edward Bel-

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knap, his executors, &c., or assigns, the said sum first above mentioned, on the first day of March, 1851, with semi-annual interest; and as collateral security for such payment, the said Daniel Richards on the same day of the date of said bond, executed, acknowledged and delivered to the said Edward Belknap, a mortgage on forty lots of land, in the sixth ward of the city of Brooklyn, with the same condition as the bond, with the power to sell the premises in due form of law, in case of the non-payment of said sum of money, according to the condition of said bond and mortgage, which mortgage was duly recorded.

By an assignment bearing date March 16th, 1850, the said Edward Belknap did grant, bargain, sell, assign, transfer and set over unto Washington Hunt, Esq., comptroller of the state of New-York, all his right, title and interest, of in and to the said mortgage and bond therein described, and the money due and to grow due thereon, with interest; which assignment was duly recorded on the said 16th day of March, 1850, which was done for the purpose of banking, as set forth in the statutes.

And by an assignment bearing date October 17th, 1853, Daniel B. St. John, the superintendent of the banking department of the state of New-York, in pursuance of the act entitled "An act to authorize the business of banking," passed April 18th, 1838, and the several acts amendatory thereof, did grant, transfer and assign unto the plaintiff, Samuel Drury, all and singular the said bond and the moneys thereupon due or to become due and owing, together with said mortgage and mortgaged premises given and granted, for the security thereof. And the plaintiff averred that he has ever since been and now is the owner and holder of the said bond and mortgage. And it was also averred, that the said Daniel Richards had failed to comply with the condition of the said bond and mortgage, by omitting to pay said sum of \$4,755, and that there was justly due the plaintiff thereon said last-mentioned sum, with interest from May 1st, 1856. That no proceedings had been had at law or otherwise, to his knowledge or belief, for the recovery of said sum of money so secured, or any part thereof.

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" And the plaintiff further shows that he is informed and believes, that Wm. H. Clark, Elizabeth S. Clark, the International Insurance Company of the city of New-York, Henry J. Scudder, receiver of the International Insurance Company of the city of New-York, and John A. Machado, have or claim to have some interest in or lien upon the said mortgaged premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of the said mortgage, and that the said Daniel Richards by deed, on the eleventh day of July, 1855, duly conveyed the said premises for a valuable consideration to the said defendant Wm. H. Clark, who covenanted and agreed therein to assume and pay the said bond and mortgage, as part consideration of the purchase money, and accepted the said deed."

The plaintiff therefore demanded that the defendants and all persons claiming under them, subsequent to the commencement of this action, might be barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises; that the said premises might be decreed to be sold according to law, &c.; and that the defendant William H. Clark, might be adjudged to pay any deficiency, &c., and for such other and further relief, &c.

"The defendants William H. Clark and Elizabeth S., his wife, demur to the amended complaint in this action, and state the following grounds of objection to the said complaint, that is to say :

" *First.* There is a defect of parties defendants, viz : Daniel Richards, the maker of the bond and mortgage set forth in said complaint, and the person primarily liable for the debt secured by the said bond and mortgage, is not made a party to this suit.

" *Second.* That the said complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them in this, to wit :

" 1. The complaint does not show that the plaintiff has any legal title to the bond and mortgage mentioned in the said complaint. The complaint shows that it was assigned to and became vested in the comptroller of the state of New-York,

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but said complaint does not show that said comptroller ever re-assigned it, or parted with his title to it.

"2. The complaint does not show that Daniel B. St. John, superintendent of the bank department, had any right, power or authority to assign the bond and mortgage mentioned in the complaint, to the plaintiff.

"3. There is no fact stated in said complaint which justifies the making of these defendants parties to this action. The general statement in said complaint that these defendants '*have or claim to have some interest in or lien upon,*' the premises, is not a statement of any *fact* or *facts* which would authorize this court to give any judgment against these defendants.

"4. The statement in said complaint, that this defendant William H. Clark, covenanted and agreed to assume and pay the said bond and mortgage, constitutes no cause of action against said defendant in favor of the plaintiff, for the reasons that the plaintiff was neither a party or privy to any such agreement, and it does not appear that any paper or deed containing any such agreement was ever signed or executed by said William H. Clark, and it contains nothing upon which this court would be authorized to render any judgment against these defendants or either of them."

The demurrer was brought to argument at a special term held at Brooklyn, in June, 1857, before Mr. Justice BIRDSEYE, who overruled the demurrer with costs, with liberty to answer in twenty days, &c., and referred the action to a sole referee, to hear and determine all the issues of law and fact, &c. From this order the defendants William H. Clark and wife, appealed to the general term.

LATSON & LOCKWOOD, *for appellants.*

I. There is a defect of parties defendants, viz: Daniel Richards, the maker of the bond and mortgage, set forth in the complaint, and the person primarily liable for the payment of the debt secured by such bond and mortgage, is not made a party.

1. This defect appearing on the face of the complaint is prop-

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erly raised by the demurrer. (*Code, section 144, subdivision 4; Wallace agt. Eaton, 5 Pr. Rep. 99.*)

2. Section 122 of the Code provides, that "when a complete determination of the controversy cannot be had without the presence of other parties, the court *must* cause them to be brought in."

3. The decree prayed for in the complaint, would not extinguish the liability of Daniel Richards on his bond for any deficiency in the sale of the mortgaged premises, if the same could not be collected of the defendant Clark; neither would it foreclose the right now absolutely vested in him, to have the mortgaged premises sold to the best advantage, in a proceeding to which he should be a party, and should have the right of appearing for the protection of his own interests. And he in such case, would have the right to have resale of the property, and the first purchaser's title would be imperfect.

4. The rights of the parties under the covenant alluded to in folio 11 of Case, cannot be finally determined in this action without Daniel Richards being a party. The covenant, if any, was between Clark and Richards, and there are rights and equities existing between them which each of them has a right to have settled in this action, and not to be compelled to resort to another litigation.

II. The said complaint does not state facts sufficient to constitute a cause of action against these defendants.

1. The complaint does not show that the plaintiff has any legal title to the bond and mortgage mentioned in the said complaint. It shows that they were assigned to and became vested in the comptroller of the state of New-York, but does not show that the comptroller ever re-assigned them or parted with his title to them.

2. The complaint does not show that Daniel B. St. John, superintendent of the bank department, had any right, power or authority to assign the bond and mortgage to the plaintiff.

3. There is no "*plain and concise statement of the facts constituting a cause of action,*" against the defendants Clark and wife, as required by section 142 of the Code. The general

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allegation that they "*have or claim to have some interest in or lien upon the premises,*" is in the alternative, and it does not state what that interest is or might be. It is in pursuance of an old rule of the court of chancery, when that court had the power to prescribe the form of pleadings in that court. But that power has by section 140 of the Code, been taken away, and positive provisions of statute law substituted, which the court can neither extend nor contract, and which requires facts to be stated, and those positively, and not in the alternative.

4. The statement in said complaint that this defendant William H. Clark, covenanted and agreed to assume and pay the said bond and mortgage, constitutes no cause of action against said defendant in favor of the plaintiff, for the reasons that the plaintiff was neither a party nor privy to any such agreement; and it does not appear that any paper or deed containing any such agreement was ever signed or executed by said William H. Clark, and it contains nothing upon which this court would be authorized to render any judgment against these defendants or either of them; and no judgment could be rendered on such covenant, except Richards was a party, so as to bind him.

W. C. BETTS, *for plaintiff.*

I. There is no defect of parties defendants by reason of Daniel Richards not being made a party. The case, (folio 11,) shows that Richards divested himself of the title to the property, and conveyed the same by deed to the defendant Clark.

II. Facts sufficient to constitute a cause of action, are stated :

1. The complaint (folio 7) shows the assignment of the bond and mortgage to Washington Hunt, "comptroller, &c.;" and folios 8 and 9 show that Daniel B. St. John, "the superintendent of the banking department of the state of New-York, in pursuance of the act entitled 'an act to authorize the business of banking, passed April 18th, 1888, and the several acts amendatory thereof,'" assigned the said bond and mortgage to the plaintiff. The said act (*R. S. § 264, p. 1168, 4th ed.*)

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possesses the "superintendent" with all the powers of the "comptroller."

2. The complaint (folio 11) above referred to, reciting the conveyance of the premises by Richards to Clark, and the payment of this bond and mortgage being assumed as part of the purchase money, besides the general allegation in folio 11, constitutes a sufficient cause of action.

By the court—EMOTT, Justice. There are but two objections in this case, which I think it necessary to notice. The first is, that the general allegation in the complaint, that William H. Clark and other defendants who are named, have or claim some interest in or lien upon the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, is not a sufficient statement of a cause of action against these defendants. This mode of statement in cases where junior incumbrancers are made parties to a foreclosure suit, was introduced into the practice of the court of chancery by the rules of Chancellor WALWORTH. The rule was made to obviate the inconvenience which mortgagees had encountered in foreclosure suits, when they were compelled to wait the determination of all the rights and equities of junior incumbrancers and purchasers among themselves, before a decree could be obtained for the foreclosure of the first mortgage. (*Hopk.* 277.) The effect of the rule was to postpone to the sale any litigation between junior incumbrancers who were co-defendants. Such disputes were thus deferred until it was ascertained that there would be a surplus after satisfying the plaintiff's mortgage, which surplus was the only fund which such a litigation concerned or which it should affect. (*See* 10 *Paige*, 395; 9 *id.* 545; 4 *id.* 85.) If the rule of pleading under the Code is stated correctly in the defendant's points, this beneficial reform will be set aside, and foreclosure suits will bristle with new difficulties. The plaintiff will be compelled to state a variety of issues to different defendants, issues in which he has no interest, and to await their determination among the defendants whom he is bound to make parties. This should not be per-

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mitted if possible, and is not, I think, required. The complaint before us states that these various defendants have or claim, each some interest in or lien upon the mortgaged premises, but in every case, such lien or interest is subsequent and subject to the plaintiff's mortgage. This states sufficiently all that is necessary for the plaintiff's purpose. The fact that these defendants have or claim some interest in the lands mortgaged, makes them proper parties to the foreclosure, and the fact that these interests are subsequent to the plaintiff's lien, render it unimportant to him or to the purposes of his suit, so long as that is confined to the foreclosure and sale under his mortgage, what the particular rights of these defendants are. They are only interested in the eventual surplus, if any, and their respective interests are material only among themselves, and not to him. All that the plaintiff asks is a foreclosure of his mortgage against their estates or interests, and it is sufficient for that purpose and to justify making them parties that they have or claim some interests or estates, but these whatever they are, are subject to his mortgage. Any detail of their titles or the extent and relative priority of their interests would be superfluous if the suit is confined to the first mortgage and the judgment proceeds no further.

It is also contended by the defendants, that the suit is defective, because the mortgagor is not a party. The equity of redemption is stated in the complaint to have been conveyed to the defendant Clark, who assumed and agreed to pay the mortgage, as part of the consideration of the conveyance which he received. The mortgaged premises are, therefore, the primary fund for the payment of the debt, and after them the defendant Clark, is next liable. He has no right to complain of the absence of his grantor, for as between these two, Clark is the principal debtor, and Richards the surety. It is only when the party, against whom the mortgagee asks a personal judgment for any deficiency, is a mere surety of the mortgagor, that he can insist that the latter should be made a party, and the plaintiff's remedy exhausted against him for any deficiency in the lands before resorting to his surety. (*See Bigelow agt.*

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Bush, 6 Paige, 343.) There is no controversy between the plaintiff and the defendants, which requires that Richards the original mortgagor, should be brought in, in order to its final determination. We cannot even assume upon the statements of the complaint, that there is any controversy between him and the defendant Clark, as to the liability of the latter to the plaintiff. But if there be, it is a dispute wholly between them, not affecting the immediate liability of Clark to the plaintiff, and with which, therefore, the plaintiff is not bound to concern himself.

It is altogether probable that the question of pleading which this demurrer presents, has been determined in some of the courts, since the passage of the Code, but if any such case is reported, it has escaped my observation, and the argument printed by the defendant's counsel, is entirely barren of any authorities affecting the question. I observe that the defendants contend that a grantee of mortgaged premises, who has assumed the payment of the mortgage, is not a proper party to a foreclosure, or cannot be made liable upon such a covenant. The reverse of this proposition has been so long settled that it needs no authorities to sustain it.

The order of the special term must be affirmed, with costs.

SUPERIOR COURT.

JAMES B. BRADY, Respondent agt. THE MAYOR, ALDERMEN
AND COMMONALTY OF THE CITY OF NEW-YORK, Appel-
lants.

The charter of the city of New-York, as amended April 12th, 1853, requires that all work involving the expenditure of more than \$250, shall be done by contract on sealed bids, and that all such contracts when given shall be given to the lowest bidder. A contract entered into by the officers of the corporation, in violation of this provision, is illegal and void, and imposes no obligation on the city.

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Although bids are advertised for and received, yet, if they are tested by a comparison which brings into view only a part of the work contracted for, and by such means the contract is awarded to one who was not in fact the lowest bidder, the contract is invalid.

When the officers of the corporation called for bids for flagging a sidewalk and laying a curb and gutter, and the making of excavation of earth and rock, if any, and stated that the lowness of the bid would be tested only by the price at which the bidders offered to lay the flagging, curb and gutter, *held*, that a contract awarded upon such a test, when it was impossible to determine by such test who was the lowest bidder, was void in respect to the excavation.

Where the contract under which the work is done is void because entered into in violation of the charter, the contractor cannot recover for the work in any form, neither under the contract nor as upon a *quantum meruit*.

A subsequent ratification of the contract by the common council, whether before or after the work is done, does not make it binding on the corporation.

Where the officers of a corporation do an act in excess of the corporate power, the corporation is not bound, and when the statute under which the corporation act restricts its action to a particular mode, none of the agents through whom the corporation acts can bind it in any other than the mode prescribed.

The officers of the corporation cannot, therefore, in such a case bind the corporation by accepting the work or confirming an assessment to pay the expenses thereof.

Those who deal with a corporation, the mode of whose action is thus limited, must take notice of the restriction in its charter, and see to it that the contracts on which they rely, are entered into in the manner authorized by the charter.

General Term, October, 1857.

Before DUER, Chief Justice, and WOODBUFF, Justice.

THIS action comes before the court at general term, on an appeal by the defendants from a judgment entered against them on the report of a referee.

The action is brought upon an alleged special contract which the complaint avers was entered into with the plaintiff by the defendants, through James Furey, then street commissioner, on the 11th of August, 1854, whereby the plaintiff agreed to set the curb and gutter, and to flag a portion of Eighty-third street, (i. e., from the Third Avenue to Avenue A,) in the city of New-York, in accordance with certain specifications annexed to the contract; and the defendants agreed to pay for the work, labor and materials, the following prices, viz: for setting curb and gutter stones, forty-five cents per

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running foot; for flagging, eleven cents per square foot; for removing rock, twenty-five dollars per cubic yard of rock removed. The amount to be paid upon the confirmation of an assessment for the work. That the work has been performed, and approved and accepted, and an assessment has been made for the work and confirmed by the defendants in common council convened, and the entire contract price is due and payable. The quantities of the respective kinds of work are then stated and averred to have been necessary to the performance of the contract, and in fact performed at the request of the defendants, and of their surveyor having charge of the work as follows:

4,046 ft. 6 in. of curb and gutter, at 45 cents,	\$1,820.92
15,686 feet of flagging, at 11 cents,	1,725.46
948 yards of rock excavation, at \$25,	23,575.00
	<hr/>
	\$27,121.38
That the defendants have made payments of 70 per cent. of the amount due,	18,985.27
	<hr/>
But refuse to pay the remaining balance, amounting to,	\$8,136.11

Which balance the plaintiff claims to recover with costs.

The answer of the defendants sets out a resolution of the common council of the 8th day of June, 1854, ordering the setting of curb and gutter, and the flagging of the street referred to, under the directions of the street commissioner, and avers that the street commissioner issued proposals inviting offers or bids for the work, which proposals are annexed to the answer; in response to which, four offers were received, the offer of the plaintiff being one. That excluding from the offers the item of rock excavation, the offer of one J. Hodgkins, was the lowest. That only two of the offers included rock excavation, viz: the offer of the plaintiff, and that of one McCabe, and that McCabe offered to make the rock excavation at five dollars per cubic yard, and that in fact McCabe

was the lowest bidder for the whole work, including the actual rock excavation in the calculation.

That the rock excavation was the most important item in the entire work, provided for in the proposals and contract, but the defendants deny that the plaintiff excavated the quantity of rock claimed for.

The answer then sets up the provisions of the amendments to the charter of the city, passed April the 12th, 1853, requiring that "all work involving an expenditure of more than two hundred and fifty dollars, shall be done by contract, on sealed bids, and that all such contracts shall, when given, be given to the lowest bidder." The general ordinance of the corporation, providing that no expense shall be incurred by any of the departments or officers thereof, unless an appropriation should have been previously made concerning such expense, and denies that any such appropriation has been made for the expense of the work in question.

Also, a general ordinance of the corporation, requiring that the "proposals for estimates or bids shall contain and state the nature and extent, as near as possible, of the work required."

The answer then avers that a contract was made by the street commissioner with the plaintiff, by James Furey, (claiming to be authorized under the said resolution, proposals and estimates or bids,) to which the answer refers, and which is averred to be the contract mentioned in the complaint, and denying all allegations not admitted, the defendants demand that the complaint be dismissed, &c.

By consent of parties, the action was referred to a sole referee to hear and determine the same, and all the issues therein.

The referee found the following facts:

First. That the defendants, on the 8th day of June, 1854, duly passed the resolution mentioned in the answer of the defendants.

Second. That on the 27th day of July, 1854, the street com-

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missioner published the proposal for offers or bids, also mentioned in the answer.

This notice (or "proposal,") invited offers from persons proposing to perform the work, and described the curb and gutter, and the flagging required, the kinds of stone, and the manner of cutting and laying. It stated that "the street is to be brought to the grade shewn on the profiles in the street commissioner's office, the sidewalks to be regulated with sufficient rise from the curbstones, and the carriage-way to be properly shaped under the direction of the surveyor," that "the portions of the sidewalk on which flagging is to be laid shall be levelled to a grade of six inches below the top of the flags, and the intermediate space filled with sand or gravel, and the residus of the sidewalk graded even with the tops of the flags."

It directed that estimators should state in their proposals the price per running foot for furnishing and setting curb and gutter stones, including regulating and removing or furnishing earth; the price per square foot for flagging, including the regulating of the sidewalks and furnishing sand or gravel; also, the removal of all surplus material or rubbish after the completion of the work; and the price per cubic yard for removing rock, if any should be found.

And the notice then further continued, "The following is the estimate of work and materials by which the bids will be tested, viz: 3,840 running feet of curb and gutter stone, and 15,600 square feet of flagging."

After some other particulars not deemed material to be stated, the notice further states, that a strict compliance with the provisions of title III, of contracts for supplies and work for the corporation, of the amended ordinances, passed May the 30th, 1849, and also as amended October the 25th, 1849, will be observed and required in all cases.

The referee found:

Third. That the lowest bidder upon the data given in such proposal, (a notice inviting offers,) could not be ascertained.

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Fourth. That the contract for said work was awarded by the street commissioner to the plaintiff, as set forth in the case on the 11th of August, 1854.

This contract is in substance as alleged in the complaint.

Fifth. That the work was completed in the autumn of 1854.

Sixth. That seventy per cent. of the contract price was paid to the plaintiff by the defendants.

Seventh. That 943 cubic yards of rock were removed by the plaintiff in doing the work.

Eighth. That the assessment list for said work was confirmed by the common council, by a resolution passed on the ninth day of August, 1856.

This assessment list showed that the amount due to the plaintiff as the *contract price* of the work, together with the incidental expenses connected with the work and the surveyor's, assessor's and collector's fees, was \$28,746, of which the sum of \$28,575, (being 943 yards at \$25,) was for rock excavation as alleged in the complaint.

It assessed \$5,093.15, upon the owners of lots along the line of the street, and left \$23,653.85, to be paid by the corporation of the city of New-York.

Ninth. That the surveyor's return and inspector's certificate, were made and filed. The surveyor's return showing the number of yards of rock to be 943, and the inspector's certificate certifying that the curb and gutter and flagging, was finished according to the contract.

Tenth, and finally. That there is due to the plaintiff from the defendants, the sum of \$8,566.24, principal and interest for work performed by him for the defendants.

The referee's conclusions of law upon the facts found by him are stated in the opinion of the court.

From the judgment entered upon the report of the referee, the defendants appeal.

A. R. LAWRENCE, JR., *for appellants.*

A. J. WILLARD *for respondent.*

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By the court—WOODRUFF, Justice. The referee has found as a conclusion of law from the facts proved, that it was the duty of the street commissioner, (in his notice inviting proposals for the work directed to be done by the common council,) to state the probable amount of rock excavation required, and to include that among the *data* by which the bids or proposals would be tested, and had no power, after excluding that part of the work from such *data*, to still go on and contract for its performance, and that the contract made by the street commissioner with the plaintiff, was illegal and void as regards rock excavation; and that the plaintiff cannot by virtue of his contract recover the stipulated price for rock excavation.

These conclusions are obviously fatal to the plaintiff's claim to recover, as such claim is alleged in his complaint. He has alleged a special contract, and the performance thereof, and claims to recover the stipulated price. The contract proved, is found to be illegal and void, and it cannot, therefore, be the ground of recovery.

The referee, however, concludes that the plaintiff is entitled to recover the unpaid balance of the contract price, and upon several distinct grounds, viz:

That the plaintiff having done the work was entitled to receive what the work performed in making such rock excavation was reasonably worth, and that the defendants have legal power to pay for work, on the basis of a *quantum meruit*, though it was done without contract, or under an illegal and void contract.

That notwithstanding the contract under which the work was done was illegal and void, the confirmation of the assessment, made to provide for the expenses thereof, amounted to a valid agreement by the defendants, that the plaintiff should be paid the contract price.

That such confirmation was in legal effect an accord, and that such satisfaction should be enforced.

And finally, that the plaintiff's claim was a disputed claim which the defendants had power to settle, and that their acts

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amount to a valid binding settlement which the plaintiff is entitled to enforce.

It is obvious to observe that there are no issues in this action adapted to raise the questions, upon the consideration of which the referee has decided in favor of the plaintiff. The ground of claim set forth in the complaint, is simply a special contract made with the defendants, duly performed by the plaintiff and his work accepted.

But assuming that the state of the pleading may be disregarded, and that the plaintiff could be permitted to claim payment as upon a *quantum meruit*, and might recover for the rock excavation what the work of making the same was reasonably worth; then so far as the judgment proceeds upon this ground, it is subject to what we deem these fatal errors: The referee awarded to the plaintiff the whole contract price, and disregarded such evidence as appeared in the case, tending to show that the rock excavation was not worth twenty-five dollars per yard, (the contract price,) when in truth proposals were made to do it at five dollars; and further, the referee refused to receive evidence offered by the defendants, of the actual value of the work, which evidence, so far as the plaintiff's claim was a title to recover what the labor was reasonably worth, was clearly, we think, admissible. It was perhaps rejected under an idea that the contract-itself fixed the value by stipulating the price to be paid, and that the value so fixed is conclusive.

Where parties have by a valid *binding* agreement, fixed the price to be paid for work and labor, such agreement is of course conclusive, and even though by reason of departures from the strict terms of such an agreement by mutual consent, the claimant finds it necessary to claim payment according to the fair value of his work, the agreement may still bind both as to the rate of compensation in particulars conforming to such agreement.

But this rule has no application to an agreement which is itself illegal and void; an illegal and void agreement no more bound the defendants to pay the price stipulated, if the work

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was done, than it bound them in any other aspect. If it was void, it could neither form the basis of recovery, nor bind the defendants to the measure of liability.

To hold this contract conclusive in respect of price would be indirectly to sustain it in the very particular out of which the illegality arises. It was not a contract with the lowest bidder, and yet to hold it conclusive as to price, is to bind the corporation to pay the highest price bidden without any valid contract or legal consent to *any* price. The requirement binding the corporation to give contracts to the lowest bidder has especial reference to the *price* which they may become bound to pay, and the measure in which that price *shall* be ascertained; and to hold a contract not so awarded conclusive on that point, is not only subversive of the law, but wholly inconsistent with the conclusion that the contract is itself illegal.

If the plaintiff claimed the value of his work, he should have proved its value, and the defendants were at liberty to give such evidence relevant to that point as they might be able. If the instrument alleged to be a contract was entered into by the defendants' officers in a manner not authorized by law, in a manner in which they had no power to bind the corporation, then the stipulations in that contract did not bind the defendants for any purpose.

And once more, there was some evidence bearing on the value of rock excavation in the testimony, showing that one of the proposals offered the performance of that part of the work at five dollars per yard. It may be true (doubtless it is) that even this is much more than the fair value; but if so, the defendants were not permitted on the trial to prove it. Now, it is obvious that if this rate had been taken as the fair value, the plaintiff would not, upon the basis of a *quantum meruit*, have been entitled to recover anything. He had upon this basis been already overpaid.

We are, therefore, for these reasons, of opinion that even if any claim in the nature of an *assumpsit* for the value of the work could be sustained, a new trial must be ordered.

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The suggestion that the confirmation of the assessment laid upon the lands adjacent to the work amounted to an agreement with the plaintiff, that he should be paid, appears to us unwarranted.

By the terms of the contract, which is held illegal and void, payment to the plaintiff was to be made on the confirmation of the assessment, and had the contract been valid, such confirmation would have been material as respects him, because the time of payment was thereby made definite.

But in every other aspect, the act of confirmation was, as respects the plaintiff, a purely *ex parte* proceeding, operating between the corporation and those whose lands were to be charged, but in no sense constituting an agreement with the plaintiff; and notwithstanding such confirmation, the inquiry whether the plaintiff is entitled to be paid, is, we think, clearly open to investigation.

The remark of Mr. Justice STRONG, in *Brady agt. The Mayor, &c., of Brooklyn*, (1 Barb. Rep. 591,) that a resolution to add a sum in question to an assessment was an acknowledgment of the debt, and a promise to pay it, if recognized at all, must be understood with reference to that particular case. There a matter in dispute had been informally referred. The persons selected had reported a sum due: the mutual assent of the parties to the amount reported due, amounted to a statement of an account between the parties: the resolution showed the defendants' assent, and the court say that when also assented to by plaintiff, the claim became valid, however informal the reference and the award thereon.

Aside from the peculiar circumstances of that case, we can see no propriety in calling a confirmation of the assessment an agreement with the plaintiff.

Such confirmation may be evidence that the work was done, and that the corporation accepted it as performance of the contract, and an admission of the amount thereof, and that is all.

The same observations are applicable to the idea that this confirmation was a valid accord. It has none of the elements

of an accord; there was no mutuality, and no consideration gives to it validity in this sense; it is simply and only a recognition of the plaintiff's right to payment under his contract. As an admission that the money was payable, it would be material to the plaintiff as evidence, if notwithstanding the illegality of the contract, the corporation had power to bind themselves by mere admissions.

In regard to the argument that the plaintiff's claim was a disputed claim which the defendants had power to settle, and that their acts amount to a binding settlement, we observe, first, that the facts as found by the referee in this case lay no foundation for any such proposition. Nothing in the facts as found intimates that there was any dispute or controversy on the subject, prior to the commencement of this action. They show a confirmation of the assessment, a compliance by the plaintiff with the conditions of the special contract, and a part payment by the defendants of the stipulated price, and that is all.

We find, it is true, in the case *some evidence* that the plaintiff's claim was the subject of inquiry and investigation by a committee of the common council; but the finding of facts would not inform the court that anything in the nature of a settlement of a disputed claim had taken place upon which the plaintiff can rely, if he is not entitled to recover upon other grounds, nor do we think the evidence showed such a settlement. The investigation had before the committee was for the information of the defendants, and as a guide to the common council in their action upon the subject, not for the purpose of negotiation, nor did it result in negotiation or arrangement *inter partes*. Whatever operation the confirmation by the common council after that investigation may have as evidence of an acceptance or approval of the work, has been already noticed, and will be hereinafter further considered.

We have thus considered briefly the specific grounds upon which the plaintiff claims to recover, notwithstanding the illegality of the contract, so far as they are distinguishable from the general ground, that the work being performed, accepted

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and approved by the defendants, they are bound to pay for it whether there was a valid contract or not.

This ground of claim, we think, is all that arises out of the performance of the work or the acts of the common council in relation thereto; and if it be sound, then the plaintiff was entitled to payment either at the contract price, or according to the fair value of the work.

Before noticing further this general ground of claim, it is proper that we should say, that we concur fully with the referee in his conclusion, that the contract itself was illegal and void, and that the plaintiff could not, by virtue of the contract, recover the stipulated price for rock excavation.

And it is material to notice, that the invalidity of the contract results from the want of power to make a contract in the manner this was made, for the purposes for which it was made. It was entirely competent to prescribe in the charter of the city the mode in which and in which alone, contracts should be made. When the powers of a corporation are limited in the charter, the acts of its officers and agents beyond the scope of those powers, do not bind the corporation. And when the mode in which the powers of a corporation may be exercised, is especially restricted, the officers and agents may not bind the corporation in any other manner. As WELLES, Justice, in *The Farmers' Loan and Trust Company agt. Carroll*, (5 Barb. Rep. 649,) says: "Where a corporation relies upon a grant of power from the legislature to do an act, it is as much restricted to the mode prescribed by the statute for its exercise as to the thing allowed to be done."

Those who deal with a corporation, whose mode of dealing is prescribed in their charter, must take notice of such prescription at their peril. In this case, the contract in question was not given to the lowest bidder.

The officers of the corporation did not take proposals from those who offered to perform the work, in a form in which it was possible to determine who was the lowest bidder. The plaintiff not only was bound to know this, but he had actual knowledge that neither the invitation for bids nor his offer

connected therewith, could enable any one to say who was the lowest bidder.

The case is not one in which all the proper elements have been taken into view, in considering whose bid was the lowest, and in which the erroneous determination by which the work was awarded to the plaintiff, resulted from unforeseen circumstances developed in the progress of the work; as where notwithstanding estimates made in good faith, the amounts or quantities were found more or less than the estimates. But it is a case, in which the great bulk of the work was laid entirely out of view, and the bids tested by what has proved a small portion of the labor stipulated for, when the residue of the work was deliberately, expressly and designedly excluded from comparison.

Not only was the statute provision of the charter violated, but the general ordinances of the city were disregarded. We feel no hesitation in concurring that a contract so made in violation of the charter, and of the general ordinances, was illegal and void, and imposed no obligation on the corporation of any kind in respect to its stipulations, whether as to price or other terms or conditions thereof.

We also observe on the subject generally, that the corporation of the city, in the matter of contracts of this description, are acting not simply as an individual acts in respect to his private interests, nor as a private corporation acts in relation to its property or concerns. They derive no property and gain no corporate benefit from the improvement of streets or other public work. They act as a public corporation in discharge of duties, and the exercise of powers which they hold as trusts for the benefit, (not of the corporation as such,) but for the citizens at large and for the public.

Not only so, they are trustees and agents in another sense. The exercise of their powers in matters such as are included in this contract, proceeds upon the assumption of benefit to contiguous land owners, to be secured through the agency of the corporation, not at their own cost, but at the land owners' expense. And that agency involves further, the creation of a

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lien upon the lands, and the enforcement of the rights of the land owners bound to contribute as between themselves. So that the defendants, as a private corporation, may be said to have no interest in the subject, but to act throughout as trustees and agents of the public and the land owners; and to be clothed with the requisite powers only for the benefit of such owners and the public.

Danger of abuses under such circumstances, is to be regarded as the reason and ground of the restriction, which requires that the contracts for work, &c., shall be given to the lowest bidder; to the end that the tax payers, or those charged with the expenses, may not be unjustly or unduly burdened, while the benefits contemplated by the proposed contracts may be secured.

The question then recurs: Are the defendants liable for work done, the contract therefor being illegal and void, because entered into in violation of the charter? And this question remains to be discussed in two aspects, in the present case. Are they liable to the plaintiff as upon a *quantum meruit*, because the work has been performed and is accepted? And have the common council power to waive the original defect in the plaintiff's claim, and by their action affirm his title to recover, so as to give him a right of action notwithstanding the requirements of the charter have not been complied with?

The answers to these questions seem to us inevitable and too obvious to allow of extended discussion. If either be answered affirmatively, the restrictions in the charter become practically null, and the officers and agents, through whom alone the corporation can act, may disregard the statute and in practice repeal it. This, to our minds, is the prominent objection to the plaintiff's claim, and laying out of view every other objection above suggested to the recovery in this case, (except so far as they are connected with this consideration,) it seems to us fatal to the plaintiff's case.

The corporation can only act through its chosen officers and agents. If they not only may pay for work and labor actually done without a compliance with the statute requisites, but are

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legally bound to such payment, then no contract is necessary, and the restrictions in the statute are a dead letter. If they may dispense with a contract, then and then only, can they confirm an illegal and void contract, and then also by any acceptance of the work and a confirmation of the contract by resolution, they repeal the statute *pro hac vice*. The relation which the corporation and its officers bear to the subject, the duties they owe to the public, and those upon whom the burden is to fall, and the nature of the powers they possess, forbid us to concede any such force to their acts. By the charter the power is limited, and it is a familiar rule that corporations can only bind themselves by contracts they are expressly or impliedly authorized to make.

It may sometimes seem a hardship upon a contractor that all compensation for work done, &c., should be denied him ; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know, before he places his money or services at hazard.

The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here, neither the officers of the corporation nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter ; and the law never implies an obligation to do that which it forbids the party to agree to do.

And for the like reason the defendants cannot be treated as ratifying the unauthorized acts of its agents. *The difficulty lies not merely in the want of original power in the agents to make the contract, but in the want of power in the corporation itself to make the contract otherwise than in the mode prescribed by the charter.*

An individual having power to make a contract may ratify or affirm it, when made by one who without authority assumes to be his agent, but if the individual have himself no such power he can no more bind himself retroactively to its performance by affirmance or ratification, than he could have done so prospectively in the first instance. The power to ratify *ex vi termini*, implies a power to have made the contract, and the power to ratify in a particular mode, implies the power to have made the contract in that manner.

An express resolution directing the plaintiff to perform the work would not have been valid or bound the defendants, and a resolution in any terms ratifying what is done by the officers of the corporation in violation of the charter, can have no greater effect. (*Boon* agt. *The City of Utica*, 2 Barb. R. 104; *Blood* agt. *Goodrich*, 12 Wend. R. 104; *Hodges* agt. *The City of Buffalo*, 2 Denio R. 113; *McCullough* agt. *Moss*, 5 Denio R. 567.)

We have considered the case without noticing a further ground of objection to the invalidity of the plaintiff's contract, and what was done in relation thereto, viz: that the general ordinances of the city were violated in making the contract, and that the subsequent acts of the common council in a particular case cannot be regarded as giving validity to an act in violation of those ordinances, and that those ordinances as effectually exclude the idea of a valid ratification of what was illegally done as if they were incorporated in the charter. In placing our opinion upon the grounds above stated, we do not design to express any opinion upon that question.

The case of *Russ* agt. *The Mayor, &c.*, (December special term, 1853,) and also the cases of *Smith* agt. *The Mayor, &c.*, (4 *Sandford Rep.* 221,) and *Christopher et al.* agt. *The Mayor, &c.*, (13 *Barbour Rep.* 567,) may be profitably consulted in reference to the whole subject. We are constrained to say that the judgment herein must be reversed, and a new trial ordered. Costs to abide the event.

Order accordingly.

SUPREME COURT.

FRANCIS N. WILSON, President of the Catskill Bank agt
ROBERT A. FORSYTH and others.

The question in this case was whether upon a conceded state of facts, the case was a proper one to be tried by the court or a jury?

Those facts were, that the assignor, at the time he executed a general assignment for the benefit of his creditors, fraudulently and without the knowledge of the assignee, withheld from the assignee a portion of his property, and subsequently converted it to his own use; and the question was, whether this vitiated the assignment?

Held, that it was a proper question for the determination of the court. There was no occasion for the intervention of a jury.

Albany Special Term, November, 1857.

MOTION to vacate order.

The action was brought by the plaintiff as a judgment creditor of James C. Forsyth, to set aside an assignment executed by the judgment debtor to the defendant Robert A. Forsyth. On the 24th of April, 1855, an order was made upon application of the plaintiff, directing that the question involved in the pleadings, whether or not the assignment was made with intent to hinder, delay or defraud creditors, should be tried by a jury. It was so tried in November, 1855, and the trial resulted in a verdict for the plaintiff. A case containing exceptions having been made by the defendant Robert A. Forsyth, a motion was made at the Albany general term, held in March, 1855, to set aside the verdict, and in May following, an order was made granting a new trial.

The object of this motion was to vacate the order of the 24th of April, 1855, by which it was directed that the issues in the action be tried by a jury. The grounds of the motion sufficiently appear in the opinion of the court.

R. H. KING, *for plaintiff.*

A. J. PARKER, *for defendant R. A. Forsyth.*

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HARRIS, Justice. It appears from the history of the trial which has already been had in this action, that James C. Forsyth, at the time he executed the assignment, had in his possession about the sum of \$5,000 in cash, with which immediately thereafter he absconded. It was not proved, nor is it now pretended, that the assignee had any knowledge of this fact. The single question upon which this action depends is, whether the fact that the assignor at the time he executes a general assignment for the benefit of his creditors, fraudulently and without the knowledge of the assignee, withholds from the assignee a portion of his property, and subsequently converts it to his own use, vitiates the assignment. The facts being undisputed, a question is presented for the determination of the court. There is no occasion for the intervention of a jury. It is not pretended that upon another trial, any different state of facts will be presented. In that case, there would be nothing for the jury to decide. It would be the duty of the court to direct a verdict for the plaintiff or the defendant, according to the view it might take of the legal effect of these undisputed facts. Under these circumstances, I think the order should be vacated. It is not a proper case for granting costs upon the motion to either party.

SUPREME COURT.

CHARLES M. WOLCOTT agt. SAMUEL B. SCHENK.

Before any proceedings can be taken to remove a *tenant*, (where the relation of landlord and tenant exists,) from the demised premises pursuant to the act entitled "summary proceedings to recover the possession of lands," &c, (2 R. S. 755,) it is incumbent on the landlord to establish three additional facts by the affidavit upon which the proceedings are founded:

1. That the rent reserved in the lease has become due and payable.
 2. That its payment has been duly demanded.
 - And 3. That default has been made in its payment.
- Those facts must be properly stated, or the officer has no power to proceed.

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When there is a personal covenant of the lessee for the payment of the rent, a demand of payment from him personally, either upon the land or elsewhere, will doubtless be a good demand within the meaning of the statute.

In this case, the affidavit of the landlord stated that "the sum of \$350 was due and payable on the 24th day of September instant; that deponent on that day demanded said rent at the usual place of business of said Schenk, in the town of Fishkill, of his agent, who informed him that said rent could not be paid." *Held*, that the affidavit was radically defective, and wholly insufficient to support the landlord's proceedings. The demand was made at the lessee's usual place of business, not on the premises, and of his agent, without saying who the agent was, or what was the nature of his agency.

Restitution of the premises may be awarded to the tenant, although the lease contains a covenant that upon failure to pay the rent at the time appointed, the estate of the lessee, and all his interest in the demised premises should from thenceforth cease and be absolutely void. Such a covenant does not determine the estate of the lessee and make it absolutely void. It becomes by the omission to pay the rent voidable at the option of the lessor, for whose exclusive benefit it applies, and a proper demand and refusal to pay must be shown to void it.

T. McKISSECK, *for the relator.*

J. J. MONELL, *for defendant.*

BROWN, Justice. Samuel B. Schenk was removed from the possession of certain premises at Fishkill, in the county of Dutchess, by virtue of proceedings had before the county judge of that county, upon the application of Charles M. Wolcott. The relation of landlord and tenant existed between them by virtue of the lease of the date of the 24th of March, 1857. Before any proceedings could be taken to remove the tenant from the demised premises, pursuant to the act entitled 'summary proceedings to recover the possession of lands,' &c., (2 Rev. Stat. 755,) it was incumbent on the landlord to establish three additional facts by the affidavit upon which the proceedings were founded. 1. That the rent reserved in the lease had become due and payable. 2. That its payment had been duly demanded. And 3. That default had been made in its payment. If the affidavit omitted to state, or stated insufficiently either of these facts, the judge or officer had no power to proceed.

The right to re-enter for the non-payment of rent, both at the

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common law and in pursuance of the statute, is a matter *stricti juris*, and whoever asserts it, must see that every prerequisite to its exercise, is exactly performed. It is a right which the law will enforce but will not favor. The statute requires that "a demand of such rent shall have been made," and it uses this expression in the sense in which it is used at the common law. We shall see what constitutes a good demand, by reference to some of the old authorities. "A material difference subsists between a remedy by re-entry and a remedy by distress, for the non-payment of rent. Where the remedy is by way of re-entry for non-payment, an actual demand must be made previous to the entry, otherwise it is tortious and trespass would lie, because a condition of re-entry is in derogation of the grant. And the estate at law being once defeated, is not restored by any subsequent payment, but a notice of distress is itself a demand." (*Shep. Touch.* 148, n. 1.) "Rent reserved payable yearly, is to be paid on the land, because the land is the debtor, and that is the place of demand appointed by law. So if a man leases rendering rent, and the lessee binds himself in a sum to perform the covenants, this does not alter the place of payment of the rent, for it may be tendered on the land without seeking the obligor." (*Co. Lit.* 201 b.) This is upon the principle that rent is a profit issuing out of lands and tenements corporeal. "Where a condition of re-entry is reserved for non-payment of rent, several things are required by the common law to be previously done by the reversioner to entitle him to re-enter. 1. A demand must be made of the rent. 2. The demand must be of the precise rent due, for if a penny more or less be demanded, it will be ill. 3. It must be made precisely upon the day on which the rent is due and payable by the lease, to save the forfeiture, as when the proviso is, that if the rent shall be behind and unpaid by the space of thirty or other number of days, after the days of payment, it shall be lawful for the lessor to re-enter. A demand must be made on the thirtieth or other last day. 4. It must be made at a convenient time before sunset. 5. It must be made upon the land and at the most notorious place of it,

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unless a place be appointed where the rent is payable, in which case the demand must be made at such place. 7. A demand must be made in fact, and so averred in pleading, although there should be no person on the land ready to pay it." (1 *Saund.* 287, n. 16.)

These authorities show the strictness required whenever the reversioner attempts to enforce his rights of re-entry for the non-payment. Where there is a personal covenant of the lessee, as in this case, for the payment of the rent, a demand of payment from him personally, either upon the land or elsewhere, would doubtless be a good demand within the meaning of the statute. In the case of *Rogers agt. Lynde*, (14 *Wendell*, 172,) the affidavit upon which the summons was issued, stated that the agent of the landlord went upon the demised premises and demanded payment of the rent, but omitted to state of whom the demand was made. The court held, that inasmuch as it appeared the demand was made upon the premises, it would infer that it was made of the tenants in possession, which would be sufficient. In the present case, the affidavit of the landlord states, that "the sum of \$350 was due and payable on the 24th day of September instant, that deponent on that day demanded said rent at the usual place of business of said Schenk, in the town of Fishkill, of his agent, who informed him that said rent could not be paid." The demand was not made of the lessee personally, nor was it made upon the demised premises. It was made at the lessee's usual place of business, and of his agent, without saying who the agent was or what was the nature of his agency. The person of whom the demand was made, may have been the lessee's agent for a special purpose, or for many purposes, without having any care over or connection with the demised premises, or any duty or authority in regard to their occupation or the payment of the rents to accrue therefor. The usual place of a man's business, is a term of very significant import in the law merchant. And had the thing demanded been the payment of a bill of exchange or a promissory note, the place of demand would have been unexceptionable.

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But the law of real property, the rights of landlords and tenants, the rules by which estates are forfeited, divested and confirmed, stand upon other grounds, and have their origin in a different class of principles. The affidavit in the particulars to which I have adverted, is radically defective, and wholly insufficient to support the landlord's proceedings. What is subsequently stated, does not supply the omission or cure the defect. Read in the most favorable point of view for the landlord, it amounts to no more than hearsay, and information derived from others that the tenant admitted the rent had been demanded and he had refused to pay it.

It is insisted, however, by the counsel for the landlord, that there can be no restitution of the premises awarded, because there is a covenant in the lease that upon failure to pay the rent at the time appointed, the estate of the lessee, and all his interest in the demised premises, should from thenceforth cease and be absolutely void. The effect of such a covenant, is not I think, to determine the estate of the lessee, and make it absolutely void. It becomes by the omission to pay the rent, voidable at the option of the lessor. Any other rule would enable the lessee to take a benefit from his own wrong. The forfeiture of the estate which may follow the default in the payment of the rent is a provision for the exclusive benefit of the lessor. He may release it or waive it by the acceptance of the rent or any other equivalent act, or he may affirm the estate of the lessee by omitting to demand payment of the rent, and to follow up such demand by the necessary measures to perfect his right of re-entry, and resume his former estate in the premises. (*Clark agt. Jones*, 1 *Denio*, 516, and the authorities there referred to.)

Nothing appears upon the face of the record to show that the rent has been demanded and payment refused. I cannot therefore say that the estate of the lessee has become forfeited.

The proceedings are reversed, and restitution awarded to the tenant with costs.

SARATOGA COUNTY COURT

GILBERT WRIGHT agt. JOSEPH MOSHER.

To entitle a party to *summary proceedings*, (*Law of 1849, ch. 193.*) to remove a tenant from the possession of premises, it must appear that the relation of *landlord and tenant* exists.

Held in this case, that the agreement entered into, (which is fully set out in the case,) for the occupation and working the farm, dividing the products and sharing the expenses, &c., did not create the relation of landlord and tenant, but made the parties to it *tenants in common*, not only of the products of the farm and the remaining profits, but of the farm also.

But assuming that the agreement was a lease and created the relation of landlord and tenant, and if the reservation of "one-third of all the remaining profits," &c., was to be considered rent reserved, then it would seem to follow that the tenant by continuing in possession, had turned his lease for an uncertain term into a lease from *year to year*.

The statute authorizes these proceedings against three classes of tenants, to wit: tenants at will, at sufferance and for years; but does not include those who are strictly tenants from *year to year*.

But the statute includes two kinds of tenants *at will*, 1. A strict tenancy at will as at common law. 2. A tenancy *at will from year to year*. The first may be terminated *at any time* that a party wills, by giving one month's notice in writing. The second may be terminated *at the end of any year* that a party wills, by giving one month's notice in writing, *terminating with the year*.

If the relation of landlord and tenant existed in this case between the parties to this proceeding, it was *held*, that the defendant must be considered a tenant at will from year to year, and was entitled to one month's notice to quit, terminating with the year, which was not given. Besides, the notice given was insufficient also, for the reason that it did not fix any day or time, expressly or by any description, for the defendant to quit. Proceedings dismissed.

Summary Proceedings, April 19th, 1858.

ON the 17th day of February, 1855, Gilbert Wright, senior, the father of the plaintiff, owned and occupied, in the town and county of Saratoga, a farm consisting of one hundred and fifteen acres of land; and on that day entered into a written agreement with the defendant in the following language:

"It is agreed between Gilbert Wright, of the first part, and

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Joseph Mosher of the second part, as follows: the said Gilbert Wright agrees to let his farm where he now lives, to J. Mosher, as follows—to make but one family, live all together off of the products of the farm, the said Gilbert to have one-third of all the remaining profits, and the said Joseph to have two-thirds, the said Gilbert to pay tax on the said farm, the said Joseph to pay the road tax; each one of the above named persons to pay half for grass seed and plaster, the said Gilbert to keep one horse on the said farm for his own use, the said Joseph to keep teams to work the farm, and all other stock; the said Gilbert to furnish one-third, and the said Joseph two-thirds; and the said Gilbert to give the said Joseph the interest on a certain note which I hold against the said Joseph of seven hundred and fifty-two dollars, as long as the said Joseph shall work the farm; each one to find his proportion of seed to sow and plant the farm. Dated Saratoga, February 17th, 1855.

“GILBERT WRIGHT,
“JOSEPH MOSHER.”

The defendant immediately entered upon the premises under this agreement, and still remains there. On the 12th day of March, 1857, Wright, senior, executed under his hand and seal, to the plaintiff, an agreement in writing, to sell and convey the premises to the plaintiff on or before the first day of April, 1858, for \$5,500. In pursuance of this agreement, Wright, senior, did on the 26th day of October, 1857, convey the premises to the plaintiff by a warranty deed. The defendant had notice of such agreement and conveyance. On the first day of November, 1857, Wright, sen., died.

On the 11th day of March, 1858, the plaintiff caused a notice in writing to be served on the defendant, requiring him to remove from the premises; but Mosher still continues in possession of the premises, without the permission and against the will of the plaintiff. On the 13th day of April, 1858, the plaintiff on an affidavit setting forth the above facts, applied to the judge of Saratoga county, for a summons against the defendant, under the act in relation to summary proceedings, &c.

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(*Laws* 1849, *ch.* 193.) The summons made returnable on the 17th day of April, was issued. On that day the parties appeared, and by their consent, the proceedings were adjourned to the 19th day of April, on which day they again appeared, and the defendant's counsel interposed objections to the plaintiff's affidavit.

POND & LESTER, *for the plaintiff.*

A. BOCKES, *for the defendant.*

McKEAN, County Judge. To entitle a party to this summary remedy, it must appear that the relation of landlord and tenant exists. This is well settled. (*Benjamin agt. Benjamin*, 1 *Seld.* 387, 388.) Did the agreement set forth above, create that relation? In *Penfield agt. Rich*, (1 *Wend.* 385,) SUTHERLAND, Justice, says: "The mills were occupied by Gelson, on shares; by which I understand that the *net profits* were to be divided between him and the plaintiff." "It was a holding or working of the mills for a share of the profits. During this period, I am inclined to think *Penfield* and *Gelson* must be considered as having been *tenants in common* in the *mills* as well as the *profits*." In *Bradish agt. Schenck*, (8 *John.* 151,) "it was proved that one *Cintiss* took the land of the plaintiff, and planted it with corn upon shares." The court say, "letting land upon shares, if for a single crop, is no lease of the land. *Schenck* and *Curtiss* were tenants in common of the corn." Referring to this doctrine, COWEN, Justice, in *Putnam agt. Wise*, (1 *Hill*, 245,) says: "It is difficult to perceive why the same form of contract for two or more years, would not continue the relation of tenants in common for the whole time." In *Penfield agt. Rich*, the tenancy in common did continue several years. In *Putnam agt. Wise*, the agreement read: "The parties of the first part, do by these presents lease, and to farm let," &c., and provided that the parties of the first part were to furnish the plaster to be used, one-half the grass seed and grain for sowing and planting, and were to have certain sheep kept on the farm. The parties of the second part were to feed

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the said sheep, they to have one-half the wool, and deliver the other half to the other parties, and were "to yield, pay and give unto the parties of the first part, one-half of all the grain raised by them on the said farm." COWEN, Justice, speaking of the agreement says: "Its words are in nearly the common form of a lease." But he adopts with approbation the language of Woodfall: "*The most proper and authentic form of words may be overcome by a contrary intent appearing in the deed of demise,*" and holds that the parties to the agreement were tenants in common.

I think that the agreement under consideration, made the parties to it *tenants in common*, not only of the "products of the farm," and the "remaining profits," but of the farm also. (See *De Mott* agt. *Hagerman*, 8 Cow. 220; *Caswell* agt. *Districh*, 15 Wend. 379; *Dinehart* agt. *Wilson*, 15 Barb. 595; 4 *Kent's Com.* 95; *Taylor's Land. & Ten. sec.* 24; *Mayhew* agt. *Suttle*, 26 Eng. Law & Eq. Rep. 139.)

But in order further to consider the case, I will assume that the agreement is a lease, and creates the relation of landlord and tenant. The question then arises, what is the nature of the tenancy? Is it a tenancy for years? a tenancy at will? a tenancy at sufferance? or a tenancy from year to year? It will be well very briefly to consider the nature of these different kinds of tenancies.

A lease for any fixed and determinate period of time, whether it be for a year, a quarter of a year, half a year, or several years, creates what is called a tenancy *for years*. (2 *Bl. Com.* 140, 143; 4 *Kent's Com.* 85.) The agreement in this case, does not specify how long the tenancy, if such it be, was to continue.

"An estate at will, is where one man lets land to another to hold at the will of the lessor." (4 *Kent's Com.* 111; 2 *Bl. Com.* 145.) "If the tenant be placed on the land without any terms prescribed or rent reserved, and as a mere occupier, he is strictly a tenant *at will*. (4 *Kent's Com.* 114; *Post* agt. *Post*, 14 Barb. 223.) "When a person takes possession of land by the license of the owner, for an indeterminate period, without any

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rent reserved, he is a remaining instance of the old strict common law tenancy at will." (*Doe agt. Barker*, 4 *Dev. N. & Rep.* 220.) In *Jackson agt. Bradt*, (2 *Caines*, 147,) KENT, Justice, says: "The circumstances under which the defendant was placed on the premises, prove him to have been strictly a tenant at will. There were no terms prescribed, nor any rent reserved, or demanded, or paid."

But in the agreement in question, terms are prescribed, and if the agreement is to be regarded as a lease, rent is reserved. The defendant is, therefore, not a common law tenant at will.

A tenant at sufferance is one who comes into the possession of land lawfully, and after his estate is ended, wrongfully continues in possession. (2 *Bl. Com.* 150; 4 *Kent's Com.* 116.) There is no provision in the agreement that the estate should end at any particular time. Therefore, Mosher has not wrongfully continued in possession, unless the plaintiff or his father, terminated by some act, his lawful term. It was by the deed, and not the death of his father, that the plaintiff acquired whatever rights he may have as against the defendant. Nothing was done to terminate Mosher's term, till the 11th day of March, 1858. He remained on the premises lawfully till that day, at all events. On that day a notice was served on him, requiring him to remove from the premises. The statute reads thus: "Whenever there is a tenancy at will or *by sufferance*, created by the tenant's holding over his term or otherwise, the same may be terminated by the landlord's giving one month's notice in writing to the tenant, requiring him to remove therefrom." (*Sec. 7, title 4, ch. 1 of part 2 of R. S.*) I have shown that a common law tenancy at will, does not exist between the parties, and as the defendant was *lawfully* in possession, and was not *wrongfully* holding over his term on the 11th day of March, it follows that there was no tenancy at sufferance, at that time; and if not then, there is not now; for the statute notice of a month, is provided to *terminate*, not to *create* a tenancy at will or by sufferance.

"The reservation of an *annual rent*, is the leading circumstance that turns leases for *uncertain terms* into leases *from year*

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to year. If the tenant holds over by consent given, either expressly or constructively, *after the determination of a lease for years*, it is construed to be a tenancy *from year to year*. A tenant for one year holding over, (by consent of his landlord,) is a tenant *from year to year*." (4 *Kent's Com.* 112, 114; *Jackson agt. Bradt*, 2 *Caines*, 174; *Nichols agt. Williams*, 8 *Cow.* 13; *Jackson agt. Salmon*, 4 *Wend.* 327.)

If the agreement in question is a lease, if the relation of landlord and tenant does exist between the parties, and if the reservation of "one-third of all the remaining profits," &c., is to be considered as annual rent reserved; then it would seem to follow, that by continuing in possession, the defendant has turned his lease for an uncertain term, into a lease from year to year, or something very much resembling it.

But does the statute make any provision for summary proceedings against a tenant who is strictly a tenant from year to year? It provides thus: "Any tenant or lessee at will, or at sufferance, or for any part of a year, or for one or more years, &c., may be removed," &c. (*Laws* 1849, *ch.* 193, § 1.) The words, "for any part of a year, or for one or more years," mean the same as "for years," as I have shown above. The statute, therefore, authorizes these proceedings against three classes of tenants, namely: tenants at will, at sufferance, and for years; but does not seem to include those who are strictly tenants from year to year. Is the defendant, however, if a tenant at all, technically a tenant from year to year, and nothing else? In *Post agt. Post*, (14 *Barb.* 257,) HAND, Justice, says: "A tenancy from year to year, so long as both parties shall respectively please, is in one sense, a tenancy *at will*; but must be terminated at the end of the year by proper notice. What notice is requisite to terminate an estate from year to year, at the will of the parties, it is not now necessary to decide." (See also *Prouty agt. Prouty*, 5 *How. P. Rep.* 81.)

I am of the opinion that the statute includes two kinds of tenancies at will. 1. A strict tenancy at will, as at common law. 2. A tenancy *at will from year to year*.

The first may be terminated *at any time* that a party wills,

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by giving one month's notice in writing. The second may be terminated *at the end of any year* that a party wills, by giving one month's notice in writing, *terminating with the year*.

In *Post* agt. *Post*, Justices WILLARD and HAND agreed that a tenancy from year to year, could be terminated only at the end of the year. Justice WILLARD thought, however, that no notice would be necessary before instituting summary proceedings, and cited *Nichols* agt. *Williams*, which, however, was before the Revised Statutes. HAND, Justice, thought notice would be necessary. But as *Post* agt. *Post* was a case strictly of tenancy at will, the question of notice before summary proceedings in case of tenancy from year to year, was not adjudicated. The rule held by the court for the correction of errors, in *Anderson* agt. *Prindle*, (23 Wend. 616,) would require that a month's notice to quit at the end of some year, counting from the commencement of the tenancy, must be given, before summary proceedings can be maintained.

If the relation of landlord and tenant exists between the parties to this proceeding, I think the defendant must be considered a tenant at will from year to year, and was entitled to one month's notice to quit, terminating with the year. No such notice was given. The tenancy, if tenancy it is, commenced on the 17th day of *February*, 1855. The notice to quit, was served on the 11th day of *March*, 1858.

The notice was insufficient for another reason. It did not fix any day or time, expressly or by any description, for the defendant to quit. (*Currier* agt. *Barker*, 2 *Gray's Mass. Rep.* 224.)

It follows, therefore, that whether the agreement between Wright, senior, and the defendant, be regarded as making them tenants in common, or as creating the relation of landlord and tenant, in either case, the proceedings must be dismissed.

Ordered accordingly.

SUPREME COURT.

FREDERICK W. BOKEE agt. JOHN W. HAMERSLEY and EDWARD STONE.

The only cases in which the court will interfere by *injunction* to stay *summary proceedings* between landlord and tenant, is: 1st. Where there has been fraud or collusion. 2d. Where the justice has not obtained jurisdiction, by want of the necessary preliminary steps or other cause, and 3d. Where the tenant, from the peculiar circumstances of the case, is precluded from setting up his defence before the justice.

In all other cases, the only remedy of the tenant is by *certiorari* to this court, by which it is now settled, (*Benjamin agt. Benjamin*, 1 *Seld.* 383,) that the court has full power to examine upon the merits, every decision of the judge upon a question of law, and to affirm, reverse or quash the proceedings, as justice may require.

A voluntary assignee in trust for the creditors of the assignor, cannot be presumed to have accepted the transfer of a lease of premises for a term of years held by the latter as lessee, without some positive act indicating his acceptance, and especially so, where the assignment does not specify the premises. In the absence of any such evidence of acceptance by the assignee, the landlord is not obliged to recognize him as the tenant, so as to make it necessary to demand the rent from him. A demand of the lessee and tenant in possession, is sufficient in such case.

To entitle a lessee or tenant to the redemption of the unexpired term of the lease under the statute, where judgment has been rendered in these summary proceedings, it must appear that the unexpired term of the lease exceeds five years at the time of issuing the warrant; and that the rents and costs have been properly tendered, or security offered within ten days for the payment thereof. And this is so although the lease may contain a conditional covenant of renewal by the landlord for a further term of years, after the expiration of the first.

New-York Special Term, October, 1858.

THIS action was brought by the plaintiff, claiming to be the owner of the leasehold estate at the corner of John and William streets, in the city of New-York, for an injunction restraining said defendant Hamersley, from interfering in said premises, and also restraining defendant Stone, from paying any rent for said premises, to said Hamersley, and that both defendants be restrained from interfering with the plaintiff's

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rights in the premises, until the further order of the court ; and also, that a judgment be made in this action, declaring all the summary proceedings taken by the defendant Hamersley, before a justice of the peace, to be void, &c., or that the plaintiff be at liberty to redeem the premises from such judgment, on paying the amount of rent and costs, &c., in ten days ; and praying for a receiver, &c.

The answer denied that the plaintiff became the owner of said leasehold premises as in the complaint alleged ; that the claim of the plaintiff thereto was merely colorable, that he pretended to have derived the same from his father, David A. Bokee, some years since, without any beneficial interest in himself, and upon some alleged trust for creditors, which so far as related to said premises he had, in fact, neither performed nor assumed ; and said David A. Bokee, and not the plaintiff, was up to the time of the commencement of the summary proceedings for the recovery of possession of said premises, both the ostensible and actual manager and owner of said premises, and as the original lessee thereof, was the person primarily liable to pay the rents reserved by the lease, and the plaintiff was not in the occupancy of said premises, or any part of them, &c. The answer also alleged, that the rent was demanded of said David A. Bokee, and also of the defendant Edward Stone, the principal under lessee and occupant, on instituting such summary proceedings, &c. Also, that the plaintiff was served with the summons and had notice of such summary proceedings, and that the plaintiff and said David A. Bokee, and said Edward Stone, appeared before the justice at the time required, to show cause, either by attorney or in person, &c. The plaintiff moved for the injunction, &c., in this action.

WARING & SIDELL, *for plaintiff.*

MAN & PARSONS, *for defendants*, argued the following points:

I. The summary proceedings are conclusive. Plaintiff was regularly made party, and served with the summons, and appeared by counsel ; and as he admits in his complaint, *acted by advice* in not defending it.

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The proceedings were in all respects regular. The justice had jurisdiction, and if plaintiff had any cause to show to the contrary, he should have shown it then. It is now a final and definitive judgment, and the proper and only remedy to avoid it, is by *certiorari*. Plaintiff admits full notice; for he says in his complaint, that "he was advised not to interfere with said Hamersley, in said proceedings before said justice." Why did he not then assert his claims, and pay or offer the rent, or give security to pay in ten days? (*Laws 1857, ch. 684, § 4.*)

II. The demand of rent may be made of the tenant in possession, although he be neither lessee nor assignee of the lease. (*Rogers agt. Lynds, 14 Wend. 172.*) The better course is to demand it of the person "owing" the rent. This seems to be the proper construction of sub. 2 of § 28. (*2 R. S. 4th ed. p. 756.*) Though as Judge SUTHERLAND said, in *14 Wend. 172*, "The statute does not distinctly say of whom demand shall be made." As the statute provides, that the demand by giving three days' notice to pay, may be served on the person "owing" the rent, it is fair to infer that the direct demand may be made upon the same person.

(*2 R. S. 4th ed. 756, § 28, 2d sub.*) "Where such person shall hold over without such permission as aforesaid, after any default in the payment of rent, pursuant to the agreement under which such premises are held, and a demand of such rent shall have been made, or three days' notice in writing, requiring the payment of such rent or the possession of the premises, shall have been served by the person entitled to such rent, on the persons owing the same, in the manner prescribed for the service of the summons in the 32d section of this title."

III. There is no ground of equity jurisdiction in this case. 1st. It is not a case for redemption under the statute, for the lease had less than five years to run, when the warrant issued. (*See Answer and the Lease, and see 2 R. S. 4th ed. 760, § 54.*) "If the unexpired term of the lease under which the premises are held, exceeds five years at the time of issuing the warrant, the lessee, his assigns, &c., may at any time within one year after possession shall have been delivered, pay or tender all

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rent then in arrear, and all costs, &c., and in such case, the premises shall be restored," &c. There has been no tender of rent and costs. 2d. Besides, the statute has prescribed the remedy by *certiorari*, and this court will not interfere as a court of equity, where an adequate remedy exists at law, or is given by statute. Besides, it is evident that the remedy by *certiorari* was intended to be exclusive, and that courts of equity should not interfere by injunction. (2 R. S. 4th ed. 759, § 47.) The supreme court may award a *certiorari* for the purpose of examining any adjudication made on any application hereby authorized. *But the proceedings on such application shall not be stayed or superseded by such writ of certiorari, or any other writ or order of any court or officer.*" (See *Smith agt. Moffat*, 1 Barb. 65, 70.) The remedy by *certiorari* is quite adequate. The *certiorari* brings up all the facts and evidence which are necessary "to enable the court to determine any point of jurisdiction or other question of law arising on the proceedings." (*Rathbun agt. Sawyer*, 15 Wend. 452; *Benjamin agt. Benjamin*, 1 Seld. 383; *Anderson agt. Prindle*, 2 Wend. 616; *Post agt. Niblo*, 25 Wend. 283; *Buck agt. Bining*, 3 Barb. 391.) No peculiar ground for equitable relief (such as fraud, collusion or the like) is alleged; nor any reason why a *certiorari* would not lie, and be as effectual as this suit could be.

IV. Plaintiff had no actual interest in the premises, and neither acted himself nor was treated by others as lessee of the premises. He was under the conveyance from D. A. Bokee, a mere voluntary assignee in trust for creditors. The assignment did not specify these premises, and the plaintiff exercised no act of ownership to make himself liable under the covenants of the lease; he was not in possession; he paid neither rent nor taxes; collected no rents and made no effort to sell; but left the entire control to D. A. Bokee. It is evident, therefore, that it was not necessary to demand rent of plaintiff. A voluntary assignee in trust for creditors, cannot be presumed to have accepted the transfer of a lease, (thus making himself liable for rents, &c.) The rents and covenants may render the lease worse than valueless to creditors. There-

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fore, in the language of the cases, (as cited in *Taylor's Landlord and Tenant*, § 458,) the assignee of an insolvent debtor, "has a reasonable time to decide whether the leasehold property can be made available for the benefit of creditors." Besides, the lease contains a clause *prohibiting any assignment* of it, and the lessor could not be bound to take any notice of an assignment. Certified copy of the summary proceedings is evidence. (*Lane* 1857, "*Act to reduce acts in relation to district courts*," &c., § 64.)

CLERKE, Justice. The court will never interfere by injunction, in these summary proceedings between landlord and tenant, except where there has been fraud or collusion, or where the justice has not obtained jurisdiction by want of the necessary preliminary steps, or other cause, or except where the tenant from the peculiar circumstances of the case, (as in *Vol-ton agt. Seignett*, 2 *Abbott*, 141,) is precluded from setting up his defence before the justice. Otherwise, the only remedy for the tenant is by certiorari to this court; by which it is now settled that we have full power to examine upon the merits every decision of the judge upon a question of law, and to affirm, reverse or quash the proceedings, as justice may require. (*Benjamin agt. Benjamin*, 1 *Selden*, 388.)

The only possible ground for the extraordinary interference of this court by injunction in the present case, is 1st. That the plaintiff is now the actual tenant under the lease, being the assignee of David A. Bokee, the lessee, and that the demand required by the statute was not made on him, but only on David A. Bokee, and, 2dly. That this is an action under § 64 of the statute, which allows the lessee or his assigns, at any time within one year to redeem, where the unexpired term of the lease exceeds five years at the time of issuing the warrant, by paying or tendering all rent in arrear and all costs.

1. With regard to the first ground, it appears that the plaintiff was the general assignee of all the lessee's real and personal estate, in trust for his creditors. The assignment does not specify these premises; the plaintiff never took possession of

them; he paid neither rent nor taxes, collected no rents, made no effort to sell; he left the whole control to the lessee, who is his father; and in short, he exercised no act of ownership, to make himself liable under the covenants of the lease. A voluntary assignee in trust for creditors, cannot be presumed to have accepted the transfer of the lease, without some positive act indicating his acceptance; because by acceptance he may make himself personally liable for payment of rent and fulfilment of other covenants, and the lease may be detrimental to the interests of the creditors. I do not think, therefore, that the landlord was obliged to recognize him as the tenant, so as to make it necessary to demand the rent from him. Besides, he was summoned as a party to the proceedings before the justice, he appeared, made no objection, that I can perceive, and certainly set up no defence. He had an opportunity after judgment under § 44, to apply to have the warrant stayed by paying the rent due and the costs, or by giving security for the payment thereof within ten days. This he has not done.

II. The second ground upon which the application is made, is not available under this complaint. It does not state that the rent and the costs have been tendered, or that anything whatever has been done by the plaintiff to entitle him to the redemption contemplated by the statute. And even if he had placed himself in the proper position in this respect, this is not a case to which the benefit of the section extends. The unexpired term of the lease did not exceed five years, at the time of issuing the warrant. The warrant was issued on the 31st of May last, the lease expires on the 1st of May, 1863.

The lease indeed, contains a covenant, that the lessor will at the expiration of the term, pay to the lessee the value of the building and improvements, which he may have made on the premises; or instead of paying for such building and improvements, the lessor may at his option, grant a renewal of the lease for a further term of twenty-one years. This is not a demise for a further term of years, it wants that essential ingredient of a demise—certainty; it depends entirely on the option of the lessor; and, in short, is nothing more than a

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covenant, giving no positive right of possession to the lessee ; but a mere right of action for its breach, in case the lessor should neither pay the value of the improvements, nor grant a renewal of the lease.

The application must be denied with \$10 costs.

SUPREME COURT.

ERASTUS DAVISON, Respondent agt. PHILIP J. POWELL,
Appellant.

The plaintiff alleged in his complaint "that he sawed and converted logs, on the days, at the times, and in the manner, and at the prices therefor charged in the annexed account, which he refers to as part of his complaint," and that the defendant was indebted, &c.

The defendant alleged in his answer, that "he denies the allegations of the plaintiff's complaint, to wit: That the plaintiff sawed and converted logs into boards, for the defendant on the *days*, and at the *times*, and to the *extent* or *quantity*, or in the *manner* mentioned in the complaint," &c.

Held, that by this denial the defendant formed no issue in the pleadings that denied the correctness of the plaintiff's account, or that he performed on the *days* and at the *time* and to the *extent* or *quantity* mentioned. It was a denial containing merely a *negative pregnant*, and amounted to no denial of any single allegation.

Books of account are not incompetent evidence. They were always a low species of evidence, but they are allowed to be *some* evidence, and if corroborated, will sustain a judgment, and especially when the account is made a part of the complaint and sworn to.

The *memoranda* of a sawyer made upon boards and slips of paper, if truly copied into a regular book of account, make it a book of original entries.

Fourth District, General Term, Plattsburgh, May, 1858.

C. L. ALLEN, JAMES and ROSEKRANS, Justices.

THIS is an appeal from a judgment entered upon the report of a referee. The complaint is for work and labor for the defendant in sawing lumber, viz: "*that he sawed and converted logs into boards on the days, at the times, and in the manner, and at the prices therefor charged in the annexed account, which he re-*

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fers to as part of his complaint," and that the defendant is indebted to the plaintiff in respect to such work, labor and services, in the sum of \$178.09, after making all proper deductions and credits, &c. The bill of items is annexed and verified. Defendant answers:

1st. He denies the allegations of the plaintiff's complaint, to wit: "that the plaintiff sawed and converted logs into boards, for the defendant on the *days*, and at the *times*, and to the *extent or quantity*, or in the *manner* mentioned in the complaint."

2d. That he carried to plaintiff's saw mill, and delivered to the plaintiff to be sawed into lumber, according to orders given by defendant, (between certain dates,) logs sufficient in number and size, to make the number of feet of lumber mentioned in the complaint, or more; that plaintiff by his carelessness or other wrongful acts, either destroyed, wasted or converted in some way, about 14,000 or 15,000 feet of defendant's lumber or logs, of the value of between \$200 and \$300: and also, that the lumber received by him from the plaintiff's mill, was carelessly and improperly sawed, and not according to the contract, and that the defendant sustained damages in that behalf to the last-mentioned sum of money, which he sets up by way of set-off, recoupment or counter claim. Plaintiff replies, denying the matters set up in the counter claim, &c. The referee reports a balance in favor of the plaintiff for \$108.73.

The defendant excepts to four only of the seventeen findings of the referee; three of them, the 3d, 9th and 14th, being findings of facts, and the 17th being the conclusions of law as to the amount plaintiff was entitled to recover. The excepted part of the facts in the 3d finding was, *that four of the defendant's logs were sold or given away by the defendant, and twenty more were not fit to be and were not sawed into anything.*

To the 9th finding, that the plaintiff's account (annexed to the complaint) is not correct. To the 14th, that the measurement of Cramer, (who measured lumber for Eaton & Gilbert,) was careless, negligent, erroneous and utterly unreliable.

J. C. ORMSBY, *for plaintiff.*E. F. BULLARD, *for defendant.*

By the court—POTTER, Justice. There is *some* evidence to sustain the referee's *third* finding. Peter Bortle, a witness, states, that "about twenty-five of the oak logs were unsound and not used, not fit for lumber; Powell drew them away; one or two pine logs were bad."

Christopher A. Brown testifies, that Powell gave away *two* logs. Frederick D. Morehouse, says, "I sawed *one* of Powell's logs for Porter, and charged the sawing to him." Ransom Baker says, "four or five of the oak logs were rotten or dozy." There is also some evidence to sustain that part of the 14th finding excepted to by the defendant.

The witness Cramer, though he gives the measurement in feet, yet says that *he does not suppose he applied his rule to one quarter of the pieces*, says it was bad lumber to measure, and he was vexed at it, and that he called it bad *manufactured* lumber. His principal, Mr. Gilbert, on the contrary, says it was *pretty fair manufactured* lumber.

The exception to the 9th finding, "that the plaintiff's account was correct," is probably the main issue in the case; and all the exceptions in the case are proper to be examined in reference to this issue.

It would be a sufficient legal answer to this exception, to say, that the defendant has no issue in the pleadings that *denies* the *correctness* of this account. The only pretence of a denial is the first answer, which is a *negative pregnant*, and amounts to no denial of any single allegation. He denies that the plaintiff performed on the *days*, and at the *times* and to the *extent or quantity* mentioned. This is no denial of anything certain. This alone would entitle the plaintiff to an affirmance of the judgment; still, if it could be seen from the case, that injustice would be thereby done, the court might permit an amendment of the pleadings to help the case in this respect. But if we look into the merits of this question, from the evidence there is enough to justify the report of the referee.

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The referee does not hold or decide that he adopts the books of the plaintiff as evidence, and there is evidence enough without the books to sustain his conclusion. The sworn answer sets up that there were logs sufficient in number and size to make the quantity of lumber charged, and the defendant does not include the price of sawing as among the things that he denies in his answer. The price, therefore, is not an issue in the case. There is evidence of a large quantity of lumber to defendant, and that the defendant drew it away with his own teams. He had, therefore, the means of accurate measurement himself. The charges in the bill for extra work, and the damages for waste and carelessness, the referee has allowed to the defendant, and he has passed upon those issues by deducting those items from the bill. Nor do I think the book of account was incompetent evidence. They were always a low species of evidence, but they are allowed to be *some* evidence, and if corroborated will sustain a judgment, and especially when the account is made a part of the complaint and sworn to. The book was not a ledger, as it is called by the defendant's counsel. Had the proof rested entirely upon this book, it would have been a weak case of proof, much too weak to be relied on; still it is within the cases admitted to some weight, and it would perhaps alone have sustained a judgment upon report of a referee who had seen and examined it. The memoranda of the sawyers upon boards and paper memoranda, if truly copied into this book, make it a book of original entries within the case of *Smith agt. Sandford*, (12 *Pick.* 139,) and *Sickles agt. Mather*, (20 *Wend.* 72,) and there is evidence of such copying. The judgment must, therefore, be affirmed.

SUPREME COURT.

THOMAS DEUCHARS agt. CHARLES L. WHEATON.

The *notice of appeal* from the justice's judgment to the county court in this case, specified the grounds of appeal as follows: "That material testimony offered on the trial was excluded;" that "material testimony was admitted which ought to have been excluded;" that "the evidence was insufficient on the question of damages, and that the judgment was against the law of the case."

Held, that these allegations of error were altogether too vague and general; they presented no particular points for review.

Case argued at June Term, at Auburn. Decided at Monroe General Term, at Rochester, September, 1858.

Present, WELLES, SMITH and JOHNSON, Justices.

APPEAL from a judgment of the county court of Cayuga. The facts sufficiently appear in the opinion.

G. O. RATHBUN, *for appellant.*

D. WRIGHT, *for respondent.*

By the court—E. DARWIN SMITH, Justice. The notice of appeal in this case, is, I think, too indefinite and inexplicit to present any particular points of error for review. The party complaining of error in the proceedings before the justice should in his notice of appeal put his fingers on the error, should specify his objection with as much precision as he would take an exception on the trial of a cause at the circuit, or would except to the decision of the court where the cause is tried by a judge without a jury or by a referee. The language is, that he should serve a notice of appeal, "stating the grounds upon which the appeal is founded." The grounds should obviously be specific and explicit, so that by looking at the grounds stated, the court can at once by reference to the return see how or where they arise, and whether they are well or ill taken. A general exception to a charge of a judge, that it is against law or evi-

dence, would not be valid, so it cannot be good as a specification of the grounds of an appeal from a justice. General exceptions to the report of a referee or of a judge, made after the decision, that he had *admitted* or *rejected* material testimony, that the evidence was insufficient on the question of damages, or on the merits, or on any other point, would not be good. The ground stated, should refer to some particular error of the justice, or decision made during the trial, as that the justice improperly received the witness John Doe, or rejected the testimony of Richard Roe, on a particular point, or overruled an objection to such testimony in whole or on some particular subject of inquiry. If a motion for a nonsuit was made and denied, the ground may then be general that the justice refused to nonsuit. Such an objection will necessarily call for a review of the whole testimony at the time when such a motion was made and denied. The codifiers and the legislature in section 358, doubtless intended to carry out the principles governing the review of the errors of courts of record, and apply the same rules and preserve the analogy to the same mode in proceedings, so far as practicable to the review of justice's judgments, by confining such review to specific grounds or allegations of error, as with exceptions to reports of referees and judges. This makes the whole theory in respect to the review by one court of the proceedings of another uniform and consistent, confining the review to specific points of error of law or fact. The grounds of error specified in this case, are "that material testimony offered on the trial was excluded," that "material testimony was admitted which ought to have been excluded," that "the evidence was insufficient on the question of damages and that the judgment was against the law of the case."

These allegations of error are altogether too vague and general. They point to no particular error or decision of the justice, they require the court to examine critically the whole return, to see whether it can possibly find some basis to sustain such allegations of error instead of pointing our attention

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to specific points of error in the ruling or decisions of the justice.

For these reasons, I think the decision of the court below should be affirmed. Judgment affirmed.

SUPREME COURT.

JOHN CANFIELD and RICHARD R. CHAPMAN agt. CHILIAN
FORD.

An action for *partition* or *sale* of premises was sustained in this case, where it appeared that the plaintiffs' interests consisted of being seized in fee simple of certain undivided parts of all the mines, ores, minerals and metals, lying and being upon the described premises; with power to go upon the land to work and raise the same, and the defendant being seized as owner of the residue of said part of the premises, &c., and the soil in fee.

St. Lawrence Circuit, July, 1857.

ACTION for partition of lands. The complaint avers that the plaintiffs are seized and possessed, one in fee simple of the one undivided third part, and the other of one-eighth part of all the mines, ores, minerals and metals, lying and being upon certain tracts or parcels of land, situate in De Puyster, in the county of St. Lawrence, known and distinguished as lands, &c., describing them as lots Nos. 125 and 126 and 181, together with the right to raise, work and carry away the said mines, ores, minerals and metals in or upon said lands, and the right to put up all buildings on all said lands which may be necessary for the purposes aforesaid, and the right of ingress and egress thereto and thereupon, for the purpose of *raising, digging* or *working* and carrying away the said mines, ores, minerals and metals, doing no more injury to the soil than may be necessary for the purposes aforesaid; and that defendant is seized of the residue of said rights in the premises.

The defendant objects that he being seized of the soil in fee, and plaintiffs only having the undivided right in the mines,

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with the right to erect suitable buildings on the land, for the purpose of working them, that plaintiffs are not entitled to a partition, inasmuch as it can only be of the ore, unraised and unworked.

BROWN & SPENCER, *for plaintiffs.*

BISHOP PERKINS, *for defendant.*

C. L. ALLEN, Justice. I have searched in vain for an authority to sanction a partition in a case of this kind. Nevertheless, from a reference to the Revised Statutes, (2 R. S. 576, § 1,) and from the necessity of the case, I think the plaintiffs are entitled to partition or a sale, under the subsequent sections. The plaintiffs have a certain right in the land on which the ores or minerals are. They have a right of ingress and egress to and from the premises; they have the right to erect buildings and machinery necessary for the raising, working and carrying off the ore, to certain parts of which they are entitled.

The defendant owns the fee of the land it is true, but plaintiffs necessarily have a certain interest, such as may be necessary for the working and disposition of the ore, in common with the defendant; and I do not well see how they can have any other remedy to enforce their rights or avail themselves of them, if defendant should claim the entire and exclusive possession of the ore bed. Perhaps they might have relief in equity, or it may be the defendant would be accountable to the plaintiffs for all the ore he raised and worked. But suppose he chose to not work it at all, how are plaintiffs to work it if he claims entire possession? Or suppose he conveys away the land, and becomes insolvent and unable to account, where is plaintiffs' security? I think that partition may be made, or at all events a sale be effected, and that commissioners must be appointed.

Order accordingly.

NIAGARA COUNTY COURT.

EDWARD A. NICHOLLS, Respondent agt. MARTIN E. ATWOOD, Appellant.

A justices' judgment recovered since the Code took effect, stands on the same footing with a judgment in the supreme court, so far as the *statute of limitations* is concerned. That is, the statute of limitations which is governed by the Code, does not run against such a judgment in *six years* from its recovery.

THE complaint in this action was upon a judgment rendered by E. Newton, Esq., a justice of the peace of the county of Niagara, on the 23d day of November, 1849, in favor of Enos Steele, against the above-named defendant for \$25.97, damages and costs, which it was alleged had been assigned to and was owned by the plaintiff. The defendant denied the allegations of the complaint, and set up specially the statute of limitations as a defence.

On the trial an assignment was produced, and proved in the words and figures following :

Justices' Court. Before E. NEWTON, J. P.,—Enos Steele agt. Martin E. Atwood, judgment for plaintiff, damages and costs, \$25.97. For value received, I hereby sell, assign and transfer over to Edward Nicholls, the above named judgment, to be collected by him. Dated, November 23d, 1850.

ENOS STEELE.

The points made, were : *First.* That the statute of limitations had run, and, therefore, the action could not be maintained.

Second. No consideration for the assignment was proved.

Third. There was no proof of the delivery of the assignment.

ELY & FARWELL, for appellant.

HOLMES, County Judge. I will dispose of the questions raised in their inverse order. The assignment was produced and

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proved on the trial. There was no evidence tending to show that it was produced by the defendant. It was a part of the plaintiff's proof, and I have no doubt the legal presumption is, that the plaintiff produced it. The assignment then was in the plaintiff's possession. The presumption is, that he came legally by it, until something is shown to throw doubt upon the legality of that possession. There was no such proof. I come unhesitatingly to the conclusion, that the delivery of the assignment was sufficiently shown.

Next, as to the consideration. The assignment contained the words "*for value received.*" This is at least *prima facie* evidence of a good consideration. (14 *John. R.* 466.)

Third. The statute of limitations was specially pleaded, and is, I presume, the main ground of defence to the action. It seems that by the common law, there was no stated or fixed time as to the bringing of actions. (2 *Inst.* 95.) But the limitation of actions is the work of various acts of parliament in England, and of various acts of the legislature in this country.

Among the actions which the Revised Statutes, (2 *R. S.* 296, § 18,) declare shall be brought within six years next after the cause of actions accrue and not after, is, "all actions upon judgments rendered in any court not being a court of record." It has been generally understood, that a justices' judgment recovered since those statutes took effect, came within their provisions, and that the statute became a bar to an action upon it in six years after the judgment was entered. (17 *Wend.* 330; 5 *Hill*, 408.)

By section 73 of the Code, the provisions of the Revised Statutes, in relation to the limitation of actions, are expressly repealed and the provisions of the Code are substituted in their stead. And by section 74, civil actions can only be commenced within the periods prescribed in title 2 of the Code.

By section 90, (which is a part of title 2,) the period prescribed for the commencement of certain actions is twenty years. Among these is "an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States."

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I cannot conceive any reason why justices' courts are not included in this provision, as well as all other courts known to our laws. It can hardly be contended that a justices' court is not a court of this state. But if any doubt could exist on this point, it is effectually settled by the ninth section of the Code, which enumerates the courts of justice of this state, and in this enumeration, No. 10, is "the courts of justices of the peace."

The prevalent idea, that the statute of limitations would run against a justices' judgment in six years from its rendition, has been derived, I apprehend, mainly from the provisions of section 71, which prohibits the bringing of an action upon a justice's judgment, (except under certain specified circumstances,) within five years from its rendition. Preventing the former practice of frequently suing over justices' judgments; but leaving as is supposed, one year next before the statute of limitations would attach, in which the plaintiff may sue over the judgment and prevent the statute from attaching.

The same section prohibits the bringing of an action upon a judgment recovered in any of the other courts of this state, under any circumstances, without leave of the court first obtained for that purpose. This has, undoubtedly, strengthened the idea that the bringing of suits on justices' judgments, was limited to five years, for the reason that the statute would prevent a suit upon them, after the expiration of six years from the time of their recovery.

What considerations induced the legislature to make the distinction between justices' judgments and other judgments, I do not know. But I can readily conceive that there may be cogent reasons besides the one suggested, that justices' judgments would outlaw in six years.

However reasonable or plausible the inferences from this section may be, that the statute of limitations would run upon a justice's judgment in six years from its recovery, they cannot override, and ought not to affect the plain and distinct provisions of other sections of the statute.

I cannot find any reported decision on the point in question,

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and am not aware that it has been directly passed upon. Still I have no doubt but a justices' judgment, recovered since the Code took effect, stands on the same footing with a judgment in the supreme court, so far as the statute of limitations is concerned.

The judgment must be affirmed with costs.

SUPREME COURT.

EDWARD C. SQUIRES agt. ORIN M. SEWARD and JOHN H. SEWARD.

a Where one count in the complaint ^{is} in the usual form of an action of *trespass*, for breaking and entering the close of the plaintiff, and tearing down, destroying and carrying away the fences, &c., whereby the plaintiff has suffered damage, &c., *And* the answer denies the allegations of the complaint, *title to real property* is not raised by the pleadings.

And in such a case, where the referee certified that on the trial, title to land came in question and was litigated, but on that question his decision was in favor of the defendants; *held*, that such a certificate was of no avail to the plaintiff, the defendants were entitled to *costs* under it, although judgment was found in favor of the plaintiff on the count in *trespass*.

Eighth District, Orleans General Term, May, 1858.

Present, MARVIN, DAVIS and GROVER, Justices.

APPEAL from order of special term, setting aside the adjustment of costs by the clerk for the defendants, and directing that the costs of the plaintiff be adjusted in his favor.

It is alleged in the first count in the complaint, that the defendants unlawfully and wrongfully broke into the close of the plaintiff, situate, &c., tore down and destroyed the fence of the plaintiff, upon and about said close, and wrongfully took and carried away the materials thereof, whereby the plaintiff has suffered damage, &c.

The complaint contains two other counts. The defendants

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denied the allegations of the complaint. The action was tried by a referee, who directed judgment in favor of the plaintiff for \$2.50, upon the first count or cause of action stated in the complaint, and that the plaintiff was not entitled to recover any sum under the other two counts. The referee certified that on the trial of the cause the title to land came in question and was litigated, but that on such question of title, his decision was in favor of the defendants.

The clerk adjusted the defendants' costs, and refused to adjust the costs of the plaintiff, and the court at special term set aside the adjustment, and directed the clerk to adjust the costs of the plaintiff, and insert them in the record. The defendants appealed to the general term.

WM. A. MACLAY, *for plaintiff.*

S. S. SPRING, *for defendants.*

By the court—MARVIN, Justice. I think the order of the special term must be reversed. The title to real property did not come in question upon the issue decided in favor of the plaintiff. It was not raised by the pleadings. The complaint is in the usual form of an action of trespass for breaking and entering the close of the plaintiff, and title to real property is not raised by such a complaint in the sense of the statute. (*Code*, §§ 54, 304.) The plaintiff may maintain the action upon his possession, and a justices' court may try the question of actual possession. (6 *Hill*, 537.) It is not to be inferred from such a complaint that the plaintiff is not in actual possession.

In *Hubbell agt. Rochester*, (8 *Cow.* 115,) it appeared that the land was wild, and the plaintiff had no actual possession, and so it appeared in *Dunckel agt. Farley*, (1 *How. Pr. Rep.* 180,) and the circuit judge also gave the certificate that title to land did come in question on the trial. In *Niles agt. Lindsey*, (8 *How. Pr. Rep.* 181,) the plaintiff alleged in the complaint that he was *seized in fee simple* and possessed of the land. The answer put these allegations in issue. It is stated in the case that it appeared from the pleadings that the plaintiff was

not in the *actual possession* at the time of the trespass. Justice DUEB, with such construction of the pleadings, held very properly, that the question of title arose upon the pleadings within the meaning of the statute. *Hubbell agt. Rochester (supra)* was an authority for this, as where the plaintiff is not in actual possession, he must prove his title to show a constructive possession.

In *Rathbone agt. McConnell*, (20 Barb. 311,) the plaintiff alleged in his complaint that he was and still is the owner and in possession of the premises, and issue was taken. It was held at general term, that a claim of title to real property did not arise on the pleadings.

It is quite clear to my mind, that no claim of title to real property was raised by the pleadings in the present case, within the meaning of the statute. The referee gave a certificate, but not one of any avail to the plaintiff. He certified that title came in question on the trial, but it was upon the issues decided in favor of the defendants, and that it did not come in question upon the issue decided in favor of the plaintiff.

The clerk decided correctly, and the order appealed from should be reversed.

Justice DAVIS dissented.

SUPREME COURT.

JONATHAN PEEL, her Britanic Majesty's principal Secretary of State for the War Department agt. JAMES SUTTON ELLIOTT.

An officer of a foreign government, specially authorized to sue for government property in his own name, may sue in the courts of this state, and arrest a defendant charged with fraudulent misapplication of that property.

An arrest granted on an affidavit sworn on information and belief, as to facts occurring in a foreign country, will be sustained, where the sources of the information are stated, and a *prima facie* case is made out.

THE defendant employed by the war department of the British government, and intrusted with moneys in the course of that employment, misapplied them and absconded. He was arrested in New-York, in an action brought by the plaintiff, as principal secretary of state for that department, specially empowered by the statutes of England to sue as such.

The affidavit on which the arrest was granted, was sworn to by the attorney for the department in America. It stated the facts as to Mr. Elliott's employment, his being intrusted with moneys, misapplication of those moneys, and his absconding. The statements to this effect, were stated to be made on information and belief, derived from letters and instructions received by him from the solicitor of the department in England, and from an exemplified copy of an inquisition taken in proceedings under an extent in the English court of exchequer in his, the American attorney's possession.

The defendant moved for his discharge, alleging insufficiency in this affidavit, and taking the following grounds:

1. That it showed no title to sue in the plaintiff, but that on the contrary, the suit should have been in the name of the Queen of England. (*Citing Republic of Mexico agt. Arrangois*, 11 How. 4.)

2. That the inquisition referred to, had the effect of a judgment.

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ment, and as such merged the original cause of arrest. (*Citing Goodrich agt. Dunbar*, 17 Barb. 647.)

3. That the affidavit was insufficient, as being grounded entirely on information and belief.

The plaintiff's counsel cited in opposition, on the first ground the statutes 5 & 6 Vict. c. 94, § 34; 18 & 19 Vict. c. 117, § 1. And on the third, relied on *Whilock agt. Roth*, (5 How. 143,) tendering additional affidavits, which the judge declined to admit.

C. A. SEWARD, *for defendant*.

I. T. WILLIAMS and HENRY WHITTAKER, *for plaintiff*.

INGRAHAM, Justice. The action may be brought in the name of the plaintiff. The statutes of England vest the property in the officer, and give him authority to sue for it. There is nothing in the decision of Judge HOFFMAN, (11 How. P. R. p. 1,) which interferes with such a mode of sustaining the action. He says: "If the state sues without the individuality of a monarch, some public officer representing it, must be upon the record. And, again, an ambassador may sustain an action on behalf of the sovereign, when the property is vested in the officer for the time being, and he is authorized to maintain an action therefor in his own name by the country he represents. I see no reason why he cannot sue in this country. This action for the recovery of the money embezzled, is not merged in the extent and proceedings thereon, nor affected thereby, so far as I have been able to obtain information in regard thereto. The one is an information for the government, the other a proceeding to obtain payment of the debt, not interfered with by the former.

The objection that the facts are sworn to on information and belief, is not available on this motion. The means of information are stated, and they are sufficient to make out a *prima facie* case, until denied by the defendant.

Motion to discharge order of arrest is denied, without prejudice to a renewal of the motion on affidavit of the defendant.

SUPREME COURT.

JONATHAN PEEL, &c. agt. JAMES SUTTON ELLIOTT.

After appeal taken from an order denying a motion, the renewal of that motion, under leave given in the order, precludes the hearing of the appeal, pending the renewed motion.

New-York General Term, September 20th, 1858.

Present, HENRY E. DAVIES, JOSIAH SUTHERLAND and HENRY HOGEBOOM, Justices.

THE defendant having appealed from the order denying his discharge, subsequently renewed his motion on affidavit, under leave given in that order.

THE plaintiff obtained time to answer the affidavit, and pending the renewed motion, the defendant moved the appeal in its order on the non-enumerated calendar.

THE plaintiff's counsel objected preliminarily that, by availing himself of the leave granted, the defendant had elected to abide by and could not impeach the order in question, and that accordingly, his appeal was untenable.

THE court allowed the objection, and refused to hear the appeal.

HENRY WHITTAKER, *for plaintiff.*

C. A. SEWARD, *for defendant.*

SUPREME COURT.

JONATHAN PEEL, &c. agt. JAMES SUTTON ELLIOTT.

Where one justice of a district sitting at special term, has judicially passed on a question raised on motion, another justice should not on a renewal of that motion, under leave given, take upon himself to pass adversely on the same point, but should deny the renewed motion, to the end that the judgment of the general term may be obtained.

The mere making of a counter claim by a defendant, after arrest, is not *per se* conclusive ground for his discharge.

New-York Special Term, September 30th, 1858.

THE defendant renewed his motion to be discharged on his own affidavit, setting up a claim for extra services to his government, to an amount exceeding the plaintiff's demand, and contending that the existence of this claim gave him the right to repay himself out of any moneys coming to his hands.

The plaintiff's affidavits negatived both the claim and the right so alleged by the defendant. Pending the reading of the affidavits, the judge suggested and counsel agreed, to reduce the statements of fact to the form of a proposition on which to argue the motion.

The following is the proposition so agreed to: "An agent receives from his principal money to be disbursed for his principal as such agent, in a specified manner, and he neglects so to apply the money, but on the contrary, appropriates it to his own use, and when the plaintiff makes the claim against him therefor, he alleges his right so to appropriate it to a claim of his against the plaintiff, although such a claim be wrongfully made in fact. Can he be arrested?"

A. OAKLEY HALL, *for defendant.*

I. T. WILLIAMS and HENRY WHITTAKER, *for plaintiff.*

DAVIES, Justice. If this suit be upon the extent and in-

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quisition, and I am inclined to think it is, then the case in 17 *Barbour*, (*Goodrich* agt. *Dunbar*, 17 *Barb.* 644,) is applicable, and the defendant is not liable to arrest, if the proceedings in England are equivalent to a judgment. As this point seems to have been partially considered by one of my brethren, I do not feel at liberty to review that decision on this occasion; and as it is a novel and important question, I deem it most judicious to deny the motion to discharge from arrest, to the end that the judgment of the general term may be taken on the points presented.

SUPREME COURT.

JONATHAN PEEL, &c. agt. JAMES SUTTON ELLIOTT.

The practice on an extent in England defined by HOGEBOOM, Justice.

The preliminary inquisition in such a case, though made by a jury and placed on record in the court of exchequer, has not, being a purely *ex parte* proceeding, the effect of merging the original cause of action or of depriving the plaintiff of a provisional remedy incident to that cause, in an action brought in this state.

A record, to have this effect, must be the result of the proceedings of a court in which jurisdiction has been acquired of the person of the defendant.

The right of a plaintiff to a provisional remedy, incident to the nature of his action, must be governed by the cause of action on which he must rely for a recovery. A mere error of definition or superfluity of statement in the complaint, does not avail to deprive him of that right.

The court did not assume to decide between the conflicting cases of *Goodrich* agt. *Dunbar*, (17 *Barb.* 644,) and *Wanzer* agt. *De Baum*, (1 *E. D. Smith*, 261.)

New-York General Term, October 1st, 1858.

Present: H. E. DAVIES, JOSIAH SUTHERLAND and HENRY HOGEBOOM, Justices.

THIS is an appeal by the defendant from an order of Justice DAVIES, refusing to vacate or discharge an order of arrest originally granted by Justice INGRAHAM.

The latter order was granted on the 15th day of July last,

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at the time of commencing this action, simultaneously with the issuing of the summons, and was founded upon an affidavit of the plaintiff's attorney, of the facts entitling the plaintiff thereto. A motion to vacate the order of arrest, was made before Mr. Justice INGRAHAM, based upon the supposed insufficiency of the affidavit before referred to, which motion was denied, with liberty to renew the same on affidavits on the part of the defendant. The defendant availed himself of this privilege, and renewed the motion to discharge the order of arrest before Mr. Justice DAVIES, upon his affidavit and the papers before used, and the same was met by counter and additional affidavits, on the part of the plaintiff. The case presented substantially the following facts:

The defendant was on and prior to the 20th day of May, 1858, her Britannic majesty's principal military storekeeper at Weedon, England, and as such was charged with the disbursement and payment to the persons entitled thereto, of various large sums of money, from time to time intrusted to him for that purpose, by the war department, of which the plaintiff was the principal secretary of state, and as such secretary, having or claiming the care and custody of the property of that department, and the right to prosecute in his own name any actions or proceedings for or concerning the same. A portion of the moneys thus intrusted to the defendant, he failed to disburse and pay over according to law, and appropriated them to his own use, under pretence of satisfying a claim which he alleged he had against the department for arrears of pay, fees and perquisites, and which he claimed he had a legal right thus to satisfy. On the contrary, the plaintiff claimed that this amounted to an embezzlement and fraudulent misapplication of those funds by the defendant, as a public officer; and a fraudulent conversion of the same to his own use.

The defendant having left or absconded from England, about the 20th of May, 1858, and come to this country, a paper supposed in these proceedings to be a *writ of extent*, was sued out by her majesty in the court of exchequer, directed to certain commissioners therein named, to inquire through a jury

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and witnesses, whether the defendant was indebted to her majesty for any sums received by him as such military storekeeper, for her majesty's use and not paid over, and if so, in what sums, and duly to take an inquisition thereof, and return the same to the court of exchequer. By the same writ the sheriff of Middlesex was commanded to summon the jury for such purpose. To this writ the return of the commissioners and the inquisition are annexed. By the latter, it is found that the defendant, "James Sutton Elliott, late of Weedon, in the county of Northampton, principal military storekeeper in the war department, in the said commission also named, is on the day of taking this inquisition justly and truly indebted to her majesty in the sum of two thousand two hundred and twenty-three pounds and three pence, for money received by the said James Sutton Elliott, for her majesty's use, and which he the said James Sutton Elliott, should have appropriated in payment of various sums due on her majesty's account, but which the said James Sutton Elliott, had neglected to do." These last facts as to the aforesaid commission, the return and inquisition, appear by an exemplified copy thereof, under the seal of the court of exchequer, and said papers are described in such exemplification as "a certain record remaining amongst the remembrances of our court of exchequer, at Westminster, that is to say, amongst the records of Trinity term, in the twenty-first year of the reign of Queen Victoria." The complaint in this action which is verified on the 10th day of August, 1858, after setting out the title of the plaintiff, and his right to sue for the cause of action therein set forth, alleges the appointment of the defendant in October, 1855, as a public officer in the war department, to wit: principal military storekeeper in the said war department at Weedon, and his continuance in said employment till about the 20th day of May, 1858, when he absconded therefrom; that he was as such storekeeper intrusted with divers property of said department, and especially with divers large sums of money for payment to the persons entitled thereto, a portion of which he neglected to pay or apply, and did on and before the 20th day of May, 1858, frau-

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duently and wrongfully, and with misconduct and neglect of the duties of his said office, embezzle and misapply, and convert to his the said James Sutton Elliott's own use and purpose, a large sum of money, part of such moneys so intrusted him as aforesaid, to wit: the sum of two thousand two hundred and twenty-three pounds and three pence, currency of the said United Kingdom of Great Britain and Ireland, the same being of the value of ten thousand eight hundred and eighteen dollars and sixty-six cents, currency of the United States of America, in fraud of the department and in breach of his duties as such public officer, and fraudulently and wrongfully misconducted himself, and absconded from the duties of his office, without discharge therefrom, and without applying or accounting for said money, and that he has never since applied the same or accounted therefor.

The complaint then states that on such embezzlement and absconding, a writ of extent was duly issued, and an inquisition was also taken under such extent in due form of law, whereby the defendant was found indebted (substantially as set forth in said inquisition,) as appeared by an exemplification of the said extent and inquisition, under the great seal of the said court of exchequer, to which he craved leave to refer. It then sets forth that the defendant has never repaid, applied or accounted, for the said sums, but is indebted to the plaintiff therefor, with interest from the 12th day of June, 1858, the date of the said inquisition, and demands judgment for that sum, with the costs of the action.

The defendant details in his affidavit, the circumstances under which he became entitled as he alleges, to the fees and perquisites; exceeding the amount of the plaintiff's claim, and which he applied in satisfaction thereof; and claims the right to apply in this action as a set-off or counter claim thereto.

The plaintiff's affidavits sufficiently substantiate the relation of the parties, the deficit in the accounts, and the misappropriation of the moneys. The only question argued upon the appeal was, whether this was properly an action for money received, or property embezzled, or fraudulently misapplied by

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a public officer, in the course of his employment as such, or by a person acting in a fiduciary capacity, or for misconduct or neglect in office, or whether the original cause of action, assuming it to have been such as would have justified an order of arrest, had been waived, merged or extinguished, by the proceedings taken in England, under the extent and inquiry?

C. A. SEWARD and A. OAKLEY HALL, *for defendant.*

I. T. WILLIAMS, *with whom was H. WHITTAKER, for plaintiff, made and argued the following points:*

This is an appeal from an order denying a motion to discharge the defendant from arrest. It is admitted that the affidavits, &c., upon which he is held, are sufficient, unless the proceedings called "a writ of extent," have so affected the relations of the parties, that the defendant cannot now be held to bail.

The only question now presented to the court for their decision is: Has the proceedings taken in England, as the same is set forth and appears in the papers before the court, so changed the relation of the parties, that the defendant cannot now be held to bail?

I. What were those proceedings, in fact?

1. The assertion on the part of the defendant, that the action is brought or founded upon those proceedings, is not only without foundation, but without the slightest pretext.

2. The cause of action is clearly set forth in the complaint, to wit: The official character of the defendant; that he received the money sought to be recovered in an official character, for certain specified uses and purposes of his government or principal; that he neglected so to apply the money, but on the contrary thereof, appropriated it to his own use, and thereupon absconded from England. It then proceeds to say, that at the suggestion of a government officer, a commission was issued out of the court of exchequer to two commissioners, directing them to inquire of a jury, (which the same commission directed the sheriff of that county to call before such

commissioners,) whether the said defendant had so misappropriated the said moneys, and if yea, to what amount? That in obedience to the mandate of that commission or writ, a jury was by said sheriff, called before said commissioners, and thereupon the commissioners made such inquiries of the jury, who found and returned to said inquiries, that the defendant was indebted to the government in the sum of two thousand two hundred and twenty-three pounds and three pence sterling, for moneys he had so received as such officer for such purposes, and which he had neglected so to apply to the uses and purposes for which they were received by him, but on the contrary had converted the same to his own use, and was therefore indebted to the government in the said sum of two thousand two hundred and twenty-three pounds and three pence sterling.

The complaint states, that these proceedings were taken according to law, and prays leave to refer to an exemplification of the return of such commission, which is produced before the court on this motion, and read as a part of the papers thereon.

The court will, therefore, look into this exemplification and see precisely what it imports, and will examine *the law* to see what the proceedings amount to, if they were (as is alleged in the complaint) *according to law*.

The suggestion of the defendant's counsel, that the plaintiff in this motion must be confined to his statements contained in the complaint is not tenable. The plaintiff may oppose the motion upon such papers and affidavits as he sees fit, and the court will look into them all to see what the facts really are. The statements in the complaint are not of the least importance, for that paper was not drawn for this purpose. It is not the office of a complaint to furnish evidence for holding to bail. This is done by affidavits and other papers, and may be done, though the complaint shows the action to be upon a simple contract claim, as upon a promissory note, &c. (*Cheney agt. Garbat*, 5 How. 467; *Masten agt. Scovill*, 6 id. 515; *Field agt. Morse*, 7 id. 16; *Delamater agt. Russell*, 4 id. 234; *Burkle agt. Ellis*, 4 id. 288; *Cotwin agt. Freeland*, 2 Seld. 560.)

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If the court will look into the papers, they will find that nothing more has been done than what is above stated.

II. What is the legal nature and character of those proceedings ?

The term "extent," seems to be applied to the whole of the proceedings that may be taken for the collection of crown debt. The term extent is, however, properly applicable only to the *writs* which are issued to the sheriff.

The first writ is an extent in chief, or an *immediate extent*, and the second is an extent *in aid*.

The *extent in chief* is issued on the coming in of the commission issued to the commissioners as above described. It is founded upon the return or finding of the jury, which return fixes the amount of property the sheriff may attach or the amount in which he may hold the defendant to bail, and is in the nature of a *capias ad respondendum*, and an *attachment* united.

This proceeding preliminary to the commencement of a suit is peculiar to suits by the crown. A private individual can have his *capias* on filing an affidavit by which the *amount* in which he may hold the defendant to bail is fixed; but the crown (so great was the jealousy of our ancestors for the liberty of the subject, and so fearful were they of oppression from the crown) was by statute of 33 Henry VIII, chap. 39, compelled to submit such an affidavit to a jury, for them to find that the statements therein were true before the crown could have a similar process.

Upon the return of this writ, the suit proceeded as in any other case. If the defendant was found and brought into court a judgment was obtained against him *in personam*. If not found, and his goods or lands were taken, then the proceedings were *in rem*, as in similar cases both in that country and in many states of this. The defendant might voluntarily appear, and in that case, his rights would be the same as if brought into court by the sheriff upon his writ of extent in chief.

The *extent in aid* was a proceeding after the return of the

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writ in chief, and has nothing to do with this case, and therefore need not be discussed. The return shows that this proceeding was nothing other or different than a proceeding upon which to found an *extent in chief*, which has been explained. All the cases cited by the defendant's counsel, are cases of an *extent in aid* as they admit. At all events, the papers do not show that anything further or other than the issuing, execution and return of this commission has been had, and the court will not indulge in any presumptions of future proceedings. Indeed, the papers show that no other proceedings were had, for 1st. The defendant had absconded, or at all events left the country; and 2d. The defendant both in his affidavit and answer, swears that he knew nothing of the proceedings, that they were *ex parte*, without notice to him, and that he is in no way bound by them.

It is true, that these proceedings were both *ex parte* and *secret*, that the defendant has no right to oppose them or have notice thereof. That their only purpose and office is to furnish proof upon which the defendant and his property might be taken on mesne process. This practice is fully discussed and explained in *Regina agt. Ryle*, (9 *Mees. & Welsby*, p. 227.)

The careful attention of the court is called to the statement of that case, the statutes cited, and the argument or rather statement of the solicitor-general, Sir WILLIAM FOLLETT, both in his opening and reply. The court will not be misled by the statement of Mr. CRESSWELL, who mistakes wholly the statutes under which the proceedings are had. The whole court concur with the solicitor-general, and Baron ROLFE thinks the proceedings are not different in character from what they would have been if the process could be issued simply upon the filing of an affidavit, as in the case of a private individual. (The foregoing will be found only in the case as reported by Meeson & Welsby.)

III. Is there anything in this proceeding that should take from the plaintiff a right which he would otherwise have had, to wit: a right to augment his security by holding the defendant to bail?

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If so, it is on some anomalous principle, certainly not on the principle of extinguishment, for the operation of that is to blot out a debt, not to waive a remedy. It is not a *waiver*, for nothing is waived. The jury found the *facts*, (see exemplification,) what else could the plaintiff do to signify his adhesion to all his rights in the premises? Is not a waiver a question of intent? If a party takes a higher security and thereby extinguishes a lower security, does he not intend to take it? Would it operate as an extinguishment if it failed to appear that he intended to receive it? Can there be a waiver without a consent expressed or implied? And if the plaintiff did all he could to signify his intent to adhere to all his rights and remedies, what evidence is there of an intent to waive?

The defendant lays stress upon the fact that the finding of the jury is entered of "record." But does a record necessarily waive any prior existing remedy? Everything is a record that is recorded or filed with the clerk of the court. The statute of this state provides that in order to enforce and establish a continuance of liens for work, labor, &c., the party shall file a statement of the items of his claim with the clerk of the court, duly verified by his affidavit, and that thereupon the clerk shall *record* the same, (a proceeding singularly analogous to those had in the case now before the court,) and the claim is thereupon spread upon the records of the court. Does any one pretend that thereby the simple contract is extinguished by a higher security? that a suit brought setting forth the work and labor done, &c., and the filing of the items and affidavit and the record thereof by the clerk, would under our former practice have been an action of debt upon a record? that an action upon the simple contract debt could not have been maintained? It might as well be said that before recording, a suit might be brought upon a mortgage, but that after the mortgage is recorded the suit must be founded upon the record.

The defendant lays stress also upon the fact that the jury found that the defendant is "indebted," &c. But if the "record" also shows that it is one of those classes of indebtedness for which a party may be held to bail, how does it help his

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case? If the defendant thinks the word "debt," ought not to have been used, perhaps he will also object to that word in the Code, where it provides that if the "debt" has been fraudulently contracted, the defendant may be held to bail. (*See Code*, § 179, *sub. 4.*)

The word debt is a word of the broadest possible signification, it includes all classes of obligations and liabilities, whether sounding in tort or contract, whether incurred "in office," or by a "person in a fiduciary capacity," or where the party has otherwise "been guilty of a fraud in contracting the debt or incurring the obligation." (*See 3 Met. R.* 522, 526; *2 Stephens' Com.* 186, 187, and *note*; *1 Bur. Dic. p.* 342; *1 E. D. Smith's Rep.* 261.)

IV. Let the proceedings recited in the document before the court, amount to what they may, no authority has been shown for saying that the plaintiff must thereby be deprived of an essential part of his remedy against the defendant in this action. It might well be presumed that in a case of so much importance as the present, if any authority existed it would have been produced.

We are referred to the case of *Goodrich agt. Dunbar*, (17 *Barb. p.* 644,) for the only authority that is attempted to be produced, and upon which alone the defendant relies.

Of that case it may be remarked: 1. It does not appear to have been considered in the light of *authority* either by the court or counsel. No case, doctrine or other authority is referred to by counsel or court, either in the argument or in the opinion.

2. Every syllable of that case upon which the defendant would rely is sheer *obiter dictum*.

The court on the first branch of the case, came to the conclusion that had there been no suit or judgment in California, still the defendant could not be held to bail upon the facts as they were made to appear before the court. It was, therefore, unnecessary to consider the effect of the judgment, and all that is said upon that subject is entirely *obiter*.

But upon the second branch of the case, *i. e.*, the effect of

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the judgment, had it been necessary to consider it, no point was made. There was no ruling, and consequently nothing is or could have been decided. If the judgment roll did not show a case for arrest, (and the court held it does not,) no point could have been raised without offering proof *aliunde* the record, to show that the cause of action was one for which the defendant might by the provisions of the Code be held to bail. No such proof being offered, the court had nothing to rule upon, and consequently could decide nothing. It is, therefore, insisted that no authority whatever has been produced for the doctrine which the defendant relies upon. The opposite doctrine is clearly held in the case of *Wanzer agt. De Baum*, (1 *E. D. Smith's R.* p. 261.)

V. Assuming the exemplification before the court to be a record importing verity, (and this is all the defendant claims for it,) it is an absolute nullity for every purpose, save perhaps two: *first*, it may fix the time from which interest should run, and it will do that provided it amounts to a demand for the money: and *second*, if it should be pretended that a suit cannot be brought in this country in behalf of the crown, unless the demand were in such a situation that an action could be commenced upon it in England, then these proceedings would obviate that objection by showing that such proceedings had been so taken, and, therefore, the demand would have been sueable in England.

For these purposes it was set forth in the complaint: 1. If a record, it is a record of nothing save what it contains. The court will then look into the record to see what it is a record of. By an inspection of that record, it will be found:

First. To recite nothing but a necessary *ex parte* proceeding upon which to found mesne process in the nature of a warrant of arrest and attachment against the person and property of the defendant. If this be so, then the defendant is reduced to the necessity of embodying his proposition in the following form, viz: "The plaintiff may not lay the foundation for a process to arrest my person, because by doing so he waives the right to arrest me at all."

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Second. It will find that it contains no recital that the defendant was in court, either by its process or by voluntary submission of his person to its jurisdiction. In the absence of recitals in the record to this effect, the record and all proceedings thereby proven or referred to, are absolutely void. (*Hulbert agt. The New Hope Mutual Insurance Co.*, 4 *How. per SILL, J.*, on page 276; *S. C.*, affirmed, *id.* p. 415; 13 *J. R.* 192; 15 *J. R.* 121, 142; 5 *J. R.* 37; 8 *J. R.* 87, 91, 193; 6 *Cowen*, 404; *Story's Conf. of Laws*, 549, and note opinion of Judge PARSONS.)

Third. It will find that the jury found that the defendant while acting in a fiduciary capacity and in office, appropriated money which he had received in such capacity and in such office, for the use of his principal to his own use, and had neglected to pay it over as he ought to have done. That such a secret *ex parte* proceeding with the intent and purpose for which this was done, should have the effect of waiving a remedy, is little less than an absurdity on its face.

Can a *waiver* take place, unless from the facts and circumstances of the case, it is inferrible that the parties intended it? Here it is shown that the intent of the act done was entirely of an opposite character by the only party who had or now has any knowledge of what was done, (for the defendant swears in his affidavit and answer, that he had and now has no knowledge or notice whatever of this proceeding.) Can an extinguishment be worked by elevating the nature of the security, where the act which is claimed to have so changed the character of the security was one to which the defendant neither assented nor had any knowledge of? If the character of the security was changed, it must have been by extinguishing the former security and receiving a higher security in the place of it. What evidence is there that the plaintiff ever consented to extinguish the former security? What evidence is there that the defendant ever gave the higher security? This could not have been done by the court, for the court had no jurisdiction of the defendant, and could not affect or vary his rights without first bringing him before it, thereby acquiring jurisdiction over him. But the record here produced, shows no

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adjudication of any court whatever. The bare finding of a jury, though their finding be recorded ever so many times, never operated to extinguish a claim. It is the judgment of the court, entered upon the finding of a jury, and the record of that judgment that works this effect. Here is no judgment of any court, no record of any judgment. The position of the defendant in any view of it, is entirely unsupported by the facts or the law of the case. It cannot be substantiated upon any of the hypotheses he presents, either on principle or by adjudications.

It is insisted, therefore, that the order appealed from should be affirmed with costs.

By the court—HOGEBROOM, Justice. The question presented for the consideration of the court in this case is, whether the defendant ought to remain under arrest within the provisions of subdivision 2 of section 179 of the Code? That section authorizes the arrest of a party in an action for money received or property embezzled or fraudulently misapplied by a public officer, or by a person in a fiduciary capacity, or for any misconduct or neglect in office. The question was argued wholly upon the effect of the judicial proceedings taken in England upon the case, and I do not, therefore, propose to discuss the question whether the defendant for acts done in England, amounting to a fraud or official misconduct towards that government, can be held to arrest here as a public officer, or guilty of official misconduct, or whether our statute is limited in its operation to cases of misconduct occurring within its own jurisdiction, or towards its own government. The precise question to be disposed of, therefore, is, whether the legal proceedings which have taken place in England, have essentially altered the original cause of action, and so deprived it of its original character or qualities, that in its present shape the action can no longer be said to be an action for money received or property embezzled or fraudulently misapplied by the defendant as public officer, or for misconduct or neglect in office. This must be determined by ascertaining the legal character-

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istics of the cause of action, on which the plaintiff must rely for a recovery in the form of action which he has adopted. I say the cause of action *on which he must rely for a recovery*, rather than the cause of action *on which he has prosecuted, or which he has set forth in his complaint*, for if all the facts as now developed show that he must rely upon the extent and inquisition, and that he cannot go back to the original official misconduct as the ground of recovery, then we must look at the extent and inquisition, and determine whether they have so far altered, merged or extinguished the original cause of action as to deprive it of those properties upon which the right to obtain an order of arrest is founded; we are driven, therefore, to investigate the character and effect of the proceedings in England, in order to determine this motion. These proceedings are denominated in the complaint in this action, a writ of extent and an inquisition thereon; but I think improperly so. They are merely the commission and inquisition which are resorted to in England as preliminary to, and the foundation of the writ of extent and inquisition, which are subsequently issued and taken. So far as I have been able to gather or understand the practice in England upon this subject, it is this:

When the queen desires to recover a simple contract debt against a subject, she may proceed by action of debt, or by a *scire facias* or *extent*, but writs of *sci. fa.* or *extent* must be founded upon matter of record, and, therefore, before proceedings can be taken to collect a simple contract debt, it must be entered of record. (2 *Tidd's Prac.* 1092; *Regina agt. Ryle*, 9 *Mees. & Welsby*, 239.)

To put the simple contract debt in this shape a commission is issued out of the court of exchequer, directed to two commissioners, and always executed in Middlesex, to inquire as to the indebtedness and its amount, under which an inquisition is taken to find the debt. When thus taken, returned and filed, it becomes matter of record, and the proper foundation upon which a writ of extent issues. It is precisely this, and no more, which has been done in the present case, according to the exemplified proceedings which are presented on *this*

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motion. No notice to the defendant is given of the execution of this commission, and none was given to the defendant in this case, and generally no evidence is given of the debt in these preliminary proceedings except the affidavit of danger which is made for the purpose of procuring the writ of extent, which is the next proceeding. (2 *Tidd's Prac.* 1093.)

This affidavit states the existence and origin of the debt, and that it is in danger of being lost in consequence of defendant's insolvency, bankruptcy or absconding, or other act leading to a like conclusion, then a *fiat* issues for a writ of extent signed by the chancellor of the exchequer or a baron, and upon this, (after the preliminary inquisition is returned and filed,) the *writ of extent* issues. This writ when issued to collect a debt due to the queen, (as it would be in the present case if the proceedings were continued in England,) is called an *extent in chief*, when issued as it sometimes may be in behalf of the *crown debtor*, (though in the name of the king or queen,) against his debtor, it is called an *extent in aid*, because its object is to aid in obtaining payment of the debt due the crown. This writ is directed to the sheriff and commands him to enter same and take defendant, and to inquire by a jury what lands and tenements, goods and chattels and debts, the defendant has (or had) and to appraise and extend the same, and take and seize them into the king's (or queen's) hands. (2 *Tidd's Prac.* 1094; *Sewell on Sheriffs*, 264; *Watson's Sheriff*, 247.)

Under this writ an inquisition is taken in obedience to its injunctions, and on its execution all parties interested may appear and give evidence, and sometimes the court is applied to to require reasonable notice of its execution to be given, although no notice is given in ordinary cases. As yet it will be observed there is no command to sell the property seized. Therefore, on the return day of the writ of extent, a rule is entered that if no one *appear* and claim the property of the goods in sennight, a writ of *venditioni exponas*, shall issue to sell the same. (2 *Tidd's*, 1115; *Sewell*, 281.) If there is no appearance the property is sold under the last named writ. If the defendant or other parties interested in the property appear,

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as he may do, he may oppose the proceedings, which is done principally in two ways, either by a motion to set aside the proceedings if there are legal objections thereto, or by a *traverse*. On a traverse the party enters his appearance and claim of property, then a *rule to plead* is entered, and the defendant puts in his *pleas*, which may contain any matter of defence, and among others that the debt does not exist or has been in some way paid or satisfied. To these pleas a replication, (if necessary,) is interposed, and an issue being formed, the cause goes to trial in the ordinary way before a jury. (2 *Tidd's*, 1124 to 1128.) A *postea* is made up and a rule for judgment entered. In practice, except where the defendant wishes to bring a writ of error, a *judgment* is seldom entered up when the verdict is in favor of the crown, as the latter is already in possession of the property under the writ of extent, nor does an execution issue, the cause being left to take the same course as if no appearance or claim had been put in. If the defendant succeeds on the trial, he is restored to the property by a writ of *amoveas manus*. (2 *Tidd*, 1128, 1129.)

This brief recital of the English practice, will help materially to illustrate this case. The proceedings in England, so far as they have taken place, are only preliminary, in their character entirely *ex parte*, and only resorted to as a foundation for a proceeding peculiar to England, at any rate wholly unknown to us under our present system, to wit: the writ of extent. It is possible that in England, an action of debt might lie in behalf of the crown upon the debt thus found by these preliminary proceedings, as it would lie upon the simple contract debt existing before the proceedings were initiated. I do not know whether this is so or not, but if it be so, I should have some doubt if England had a statute like ours in regard to arrest, whether the character of the claim would be thereby so entirely metamorphosed as to forbid an arrest. I should think it certainly would not be if the plaintiff had his election either to sue upon the original simple contract debt or the debt of record, which was the result of the preliminary proceedings. There would have occurred no satisfaction of the debt, no vol-

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untary change by the mutual consent of the parties of the character of the debt, no particular equity for depriving the plaintiff of his original remedies, nothing indeed occurring but a proceeding which gave greater certainty, precision and permanency to the debt. Still if the plaintiff was restricted to his remedy upon the debt of record, it might well be said his cause of action was not the same as at first. In the first proceeding he would be obliged to proceed upon the original cause of action, the simple contract debt. In the other case, he would be obliged to proceed upon the record debt, and would neither be required or allowed to go back to the original cause of action. But taking the facts of this case, I do not see how he could found an effectual or conclusive cause of action upon an *ex parte* proceeding. It is as to the defendant as if it had never taken place. I know of no transaction upon which a right of action against another can be founded, unless he has in some way become a party to it, or unless in some legal proceeding jurisdiction of his person had been obtained. Even, therefore, if the action had been prosecuted in England under a statute similar to ours, I think the plaintiff could not rely for a recovery upon what are (erroneously) called in this case, the extent and inquisition, for the reason that the proceeding was wholly *ex parte* and liable to a jurisdictional objection. He would be driven therefor to his original cause of action. But in this state, we have no writ of extent, no proceedings in any way analogous, and the plaintiff institutes the ordinary action to recover his debt. In his complaint it is very apparent that he sets forth all the facts independent of the extent and inquisition, which he would have set forth if he had been suing upon the original cause of action alone. But he sets forth also, the extent and inquisition, as on this motion he alleges not as the substantive cause of action, but as a fact in the history of the cause of action, giving at most precision and certainty to his claim, and furnishing a date from which to charge interest. On the other hand, the defendant claims that it is put forth as the real and substantive cause of action, the record on which the plaintiff relies for a recovery, and that the other

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allegations are only by way of introduction or inducement. But it is clear to my mind, that it is not a record in the ordinary sense of that term; that is, a matter conclusive upon the parties, incapable of contradiction and importing absolute verity.

In a restricted sense, it is a record like a recorded mortgage or a recorded deed; that is, it is entered of record. But it has not even the force of a recorded deed or mortgage, for they purport to be the act and bear the signature of the adverse party, whereas this is a wholly *ex parte* proceeding, and would have no more inherent force than a judgment, decree or record made upon the party's own motion without notice to the adverse party, in a case where the practice of the court required the facts in the complaint to be verified by a disinterested witness. I think such a proceeding independent of a statute giving it efficacy, can have no such force by the principles of the common law as a substantive cause of action as would allow of its being declared on as such, or as having inherent vitality, independent of the aliment or support it derives from the original cause of action. If this be so, then the so called extent and inquisition amount to nothing as a cause of action, and if they are ineffectual for that purpose, they are also ineffectual to deprive the plaintiff of the benefit of the circumstances under which the original cause of action arose. In other words, the plaintiff has not, even if he originally attempted to do so, succeeded in so altering, merging or extinguishing his original claim, as to give it a new character or make it a new thing. The present action is still an action to recover money or property embezzled or fraudulently misapplied by a public officer, or for misconduct or neglect in office.

The result at which I have arrived upon this part of the case, contrary I am free to say, to my original impression, makes it unnecessary for me to examine the question whether in case the plaintiff had succeeded in transforming his original claim into a judgment, he would thereby have perfected the right to arrest the defendant incident to his claim in its original character. Upon that subject, the authorities so far as they

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have gone, are conflicting. Judge MITCHELL, of the supreme court, in *Goodrich agt. Dunbar*, (17 Barb. 644,) maintains the affirmative of this proposition, while Judge WOODRUFF, of the common pleas, in *Wanzer agt. De Baum*, (1 E. D. Smith's Reps. 261,) as strenuously upholds the negative. I do not think the present case calls for a decision of that question.

I am, therefore, of opinion that the defendant is not entitled to be discharged from arrest, upon the ground argued before us on the appeal, and that the order of the special term should be affirmed with costs.

Order affirmed accordingly.

SUPREME COURT.

JOHN F. BUTTERWORTH, Receiver of the Island City Bank
agt. WILLIAM O'BRIEN and JOHN O'BRIEN.

Corporations cannot recover back usurious premiums paid by them on the loan or forbearance of money.

The proper construction of the statute of 1850, (*Laws of 1850, ch. 172, § 1*), which says: "No corporation shall hereafter interpose the defence of usury in any action," forbids such recovery.

New-York General Term, September, 1858.

Present, DAVIES, SUTHERLAND and HOGEBOM, Justices.

THIS is an appeal from an order of Mr. Justice SUTHERLAND at special term, sustaining a demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The complaint sets forth in due form the appointment of the plaintiff as receiver of the Island City Bank, a banking corporation; and then alleges that prior to his appointment as such receiver, and within one year past, the said bank has paid and said defendants have received on the loan or forbearance of various sums of money by said defendants to said bank, the sum of \$10,000 in excess of interest over

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and above the legal rate of seven per cent. per annum, which he cannot state with precision or particularity, but charges that the defendants can do so. Plaintiff therefore, prays an accounting, to determine the amount thereof, and judgment for that sum. The complaint also contains a prayer for general relief.

CHARLES A. PEABODY, *for plaintiff.*

I. The highest rate of interest allowed by law in this state is seven per cent., (1 *R. S. p. 772*, §§ 1 and 2,) all the contracts for a higher rate than that are void. Any excess paid above this rate may be recovered back. (1 *R. S. p. 772*, § 3.) The excess beyond legal interest could be recovered back at common law, without the aid of the statute. (*Wheaton agt. Hibbard*, 20 *Johns. R.* 290.) This is confessedly the case now as to natural persons.

II. The statute of 1850, which enacts that "no corporation shall hereafter interpose the defence of usury," does not alter the rate of compensation for the use of money, or legalize a contract by a corporation for a higher rate than that theretofore allowed by law.

III. The "defence" of usury in that statute, means a defence used to defeat a claim, for the reason that usury had been reserved or agreed to be paid, concerning it. A defence to a claim or debt by reason of a taint of usury. This is what was understood and meant by "the defence of usury." It has no other meaning either in common parlance or in the books.

IV. A corporation, therefore, is only prohibited by this statute to interpose the fact of usury to defeat a claim, because of the taint of usury. It merely takes from corporations the right to insist on the forfeiture of the debt or claim. The statute was penal in its character. It was so as to corporations as well as natural persons. It is so no longer as to corporations.

V. The statute does not legalize a contract by a corporation to pay what would be usury, if agreed to be paid by a natural person. The language used would have been far different if

that had been intended. It does not repeal the laws against usury as to corporations. It may, perhaps, be said to repeal the penalties against it as to them. It assumes the continued existence of usury as to corporations when it restrains them from interposing it as a defence. The penal feature, or one enforcing a forfeiture, alone is repealed.

VI. There was in existence a system of legislation, the purpose of which was to restrict the rate of interest on money. No reference is made to any feature of this system, and no suggestion of an intent to alter this rate. It stands as it was. Seven per cent. is still the highest rate allowed by law.

An evil was perceived, however, which the legislature proceeded to remedy. It was the use made of the "defence of usury," by corporations. Not that the rate of interest as to them was too low or should in any manner be altered. No suggestion was made of this kind. But the "use made of the defence of usury," was the evil to be avoided, and to which the legislature addressed itself, when this statute was produced. (*Curtis agt. Leavitt*, 15 *N. Y. Rep.* 1.)

These views are the same as those expressed in *Curtis agt. Leavitt*, (15 *N. Y. R.* p. 1; see p. 229, *opinion of PAIGE*.) He puts his decision of the question of the constitutionality of the law of 1850, as to contracts previously entered into, on the ground that the law as it stood before was penal, and to warrant his decision on that ground, he must have limited the operation of the act of 1850, to that feature of the law or that use of the defence that the act of 1850, only affected it in its penal feature.

So in speaking of the effect of the statute of 1850, he treats only of *the defence of usury*, and of that as operating to cause a forfeiture; and treats the repeal (as he terms it) of the former laws as extending only to the penal effect of the statutes. (*See p. 229.*) The question there necessary to be decided was whether the prohibition against that defence as to corporations related to contracts made before the law of 1850 was passed; and if so, whether it was valid as to such contracts?

SHANKLAND, page 173, speaking of this law of 1850, says:

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It does not impair the obligation of a contract, but merely deprives "*the borrower of a defence in the nature of a penalty or forfeiture,*" and, therefore, he says, that it may apply to prior contracts without the constitutional objection as to vested rights. (*See also opinion of BROWN, pp. 151 and 152.*) He calls the law, which the statute of 1850 prohibits corporations to avail themselves of, "severely penal in its provisions." He speaks of the "penal and savage nature of the act," and proceeds to say, that the retrospective character of the act does not make it void, because the rights which it took from the corporations were of the nature of a penalty, not vested and of perfect obligation. That case proceeds on the idea that the statute of 1850 affects only the penal feature of the law; and all the opinions proceed on that idea. In any other view it must under the course of reasoning adopted there, have been adjudged as to that case unconstitutional as operating to divert a vested right. The result of that case is, that the constitutionality of the law was sustained as to the contract in question made prior to the passage of the law, because it only took away the right to claim a penalty.

WALDO HUTCHINS, *for defendant.*

I. A conclusive answer to this action is, that it is brought *in fact* by a corporation, that is prohibited by statute from interposing the defence of usury in any action. (*Laws of 1850, p. 884, chap. 172.*)

II. If an action had been brought by the defendants against the Island City Bank, upon an evidence of indebtedness, including interest, at a greater rate than seven per cent., the bank could not have interposed the defence of usury. The defendants in this action, would in such an action have recovered the full amount. But if this action can be maintained in the case supposed, the bank could at once have turned round and sued the O'Briens in the same court in which the original action was brought, and have by the judgment of the court, recovered back a sum of money which had previously by the judgment of the *same* court been awarded to the O'Briens,

thus indirectly doing what could not be directly done. This would controvert well established principles of law and lead to a multiplicity of suits, which the law will not tolerate.

III. As we understand the law of 1850, it leaves parties when dealing with corporations, to make their own bargains or contracts as to the rate of interest, and when made, the corporation is *prohibited* from interposing the defence of usury in any action.

Such has been the effect given to the statute. Many, if indeed not all, the railroad corporations in this state, have issued bonds bearing a greater rate of interest than seven per cent., or if not bearing a greater rate than seven per cent. have been sold at rates greatly below par, thus indirectly allowing more than seven per cent. interest. To allow this action to be maintained, would be to allow in all such cases an action to be maintained by every company, to recover back the excess over and above seven per cent., whenever and as often as paid. And as the bonds are scattered throughout the community, and held by hundreds if not thousands of different individuals, separate actions would be necessary against each, and it would almost become necessary to constitute a court for the trial of such actions.

We are confident the court will not give a forced construction to the statute which will lead to such results. Although the question has not been definitely passed upon by the courts, still it has been in effect decided in the case of *Curtis and others* agt. *Leavitt*, reported in 1 *Smith's N. Y. Reports*.

Judge COMSTOCK says at page 85: "My impression is, that the act, (the act of 1850 above cited,) must be construed as a *repeal* of the statute of usury as to *all contracts* of corporations stipulating to *pay* interest, thus leaving the contracts in *full* force according to their terms, and that such an act is liable to no constitutional objection."

If this be so, then it is an end of this case. But besides, there was no law in force at the time the contract was made between the bank and the O'Briens, which made it an illegal contract. Then how or upon what ground *after* the money

has been paid, can an action be maintained to recover it back?

IV. And again, the complaint is defective in this, that it does not set out distinctly the terms of the usurious contract. In *4th of Paige*, *Vroom* agt. *Ditmas*, the chancellor states the rule to be as follows: "The defence must be *distinctly* set up in the plea or answer, and the terms of the usurious contract, and the *quantum* of the usurious interest or premium must be specified and distinctly and *correctly* set out, the defendant *must prove the usury as laid*."

The same rule also applies to a substantive cause of action. (12 *Barb.* 602.) On this point, also see 8 *Paige*, 457, where the averment that the party "had reserved a greater rate of interest than seven per cent. per annum," was held insufficient. (See also 3 *Hill*, 564.) The allegation in the complaint in this action is, that the defendants received, "at least the sum of \$10,000," &c., &c., and then at folio 4, the plaintiff distinctly avers, "that he cannot state the precise amount of such excess," &c., and then goes on to state that the defendants can inform him, and prays for an accounting. To allow this action to be maintained, would as the defendants conceive, violate *all* rules of pleading, applicable to actions brought upon usurious contracts.

By the court—HOGEBROOM, Justice. This case presents the question, whether a corporation may recover back usurious premiums paid by it on the loan or forbearance of money? It involves the construction of the act of 1850, which is as follows: "No corporation shall hereafter interpose the defence of usury in any action." (*Laws of 1850, ch. 172, § 1.*) Our statute forbids any person or corporation directly or indirectly to take any greater sum than at the rate of seven per cent. per annum, for the loan or forbearance of money. (1 *R. S.* 771, 772, §§ 1, 2.) And as a consequence of or penalty for the violation of this statute, authorizes any person paying such larger sum to recover back such excess, if the action be brought within one year after the payment. (§ 37.) The benefit of this

latter section (prior to the act of 1850,) probably attached to corporations. Although it is observable that the *second* section, which forbids the taking of usury, uses both the words "person," and "corporation," and extends the prohibition to both, whereas the *third* section, which authorizes a suit to recover back the usury, uses only the word "person," and not "corporation;" subsequent sections of the statute, declare void all bonds, notes, contracts, evidences of debt, reserving any usurious premium, (§ 5,) authorize the prosecution thereof to be restrained by injunction, (§ 14,) and make the taking of usury a misdemeanor, (§ 15.) In this shape the statute against usury as amended in 1887, remained until the act of 1850 was enacted, which simply provided that "no corporation should thereafter interpose the defence of usury in any action." This statute, like every other of general application, should receive a construction in accordance with the intent of its framers, and in furtherance of the object sought to be accomplished. It was probably intended in part, at least, for the *benefit* of corporations, to enable them to obtain in critical emergencies pecuniary facilities for the promotion of the objects of their incorporation. They are forbidden to interpose the *defence* of usury, and, therefore, when prosecuted upon a usurious contract they were bound to pay or suffer judgment against them. And I think the fair construction of the statute is, that they were bound to pay not only the sum actually borrowed with legal interest, but also the *usurious premium*. The law creates no distinction between the sum actually borrowed with interest and the *excess* over seven per cent. It declares that they shall not interpose the *defence for any purpose*. What they have agreed to pay they must pay. The contract is made *legal* as to them, by removing every legal obstacle to a recovery against them. Hence, evidences of debt securing or reserving as against them, what would otherwise be an usurious premium, are not void or illegal, but are lawful, and the whole amount may be recovered in an action. If so, then I think it cannot subsequently be recovered back. It would contravene well settled principles and all legal implication, first to allow a re-

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covery of the usury, and then to allow it to be immediately recovered back. I do not understand that the law allows such things to be done. Now in the case of natural persons as to whom the laws against usury are in no wise repealed or modified, they may recover back money actually paid by way of usury; first, because the agreement to pay and the act of payment are illegal transactions; and secondly, because the law presumes that the urgency of their pecuniary necessities may have left them no practical option except to obtain the money at the time of the original loan on such terms as they could. But if actually prosecuted on the usurious contract, I know of no law or legal rule by which they may suffer a recovery, and then turn immediately round and by a prosecution on their part get back money as to which they had a legal and valid defence against its recovery when originally prosecuted. If these views are correct they dispose of this case. If a suit for the usurious premiums could not be successfully defended, neither can they be voluntarily paid, or compulsorily collected; and then be restored to the party originally paying them, through the agency of a suit instituted for that express and only purpose. Such is this suit and it must fail for the reasons stated.

Again; the only just or legal foundation, (prior to the statute of 1850,) for the suit to recover back usurious premiums paid, was the *illegality* of the original transaction, the fact that the *receipt* of the money by the usurer was forbidden. But the statute of 1850, by prohibiting the defence has removed the *taint* of usury. It is no longer as to corporations *illegal*. It has become a lawful and proper transaction; hence the reason of the rule which allowed the action to recover back the money fails. The illegality being removed, the foundation for the action no longer exists.

It is argued that this is giving the statute of 1850 a more extended meaning than was designed by its framers; that it was only intended to take away the *defence* of usury to prevent the *avoidance* of a contract otherwise valid, for that cause, and not to pronounce usury lawful or to repeal the law which for-

bids it. It is argued that full effect may be given to the statute of 1850, by preventing a party from defeating a contract on account of usury, or from setting it aside and cancelling it in a court of equity; and that this is the more benign and equitable construction, and most consistent with the spirit of the law, inasmuch as it compels a party to do just what is equitable, to wit: to pay the money actually borrowed, and legal interest, and relieves him from what is inequitable, oppressive and against the policy of the law.

But I do not find sufficient foundation in the phraseology of the law, upon which to build such a construction. The language is general and unqualified; it takes away the defence and the *objection* of usury. It strikes it out of existence, and the ordinary consequences must follow. It not only disallows the defence, but it forbids it to be used in any way defensively, that is to accomplish the same object by affirmative action, as for example, in a proceeding to vacate or set aside a contract as would be accomplished by strictly defensive action; as for example, in setting up the usury in an answer to an action on the contract. If it goes this length, and it was rather conceded on the argument that it did, then I think it goes still further and forbids not only a defence to an action for the usury or usurious premium, but forbids an action to recover back the usurious premium. The money borrowed, the legal interest and the usurious premium, are all mingled together in one transaction, form part of one single and indivisible contract, and when the statute says, the defence of usury shall not be interposed to it, I think it means to each and every part of it, no one part of it more than another. At least, I feel bound to put that construction upon it until the legislature speak in more specific and discriminating terms.

I think this view of the statute of 1850, is taken in substance by all the judges of the court of appeals, who delivered opinions in the case of *Curtiss agt. Leavitt*, (15 *N. Y. Rep.* 9; see opinion of COMSTOCK, *J.*, p. 85; of BROWN, *J.*, pp. 152, 154; of SHANKLAND, *J.*, p. 173; of PAIGE, *J.*, pp. 228, 230; of SELDEN, *J.*, pp. 254, 255.)

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The result is that the complaint is radically defective and cannot be sustained. It becomes unnecessary, therefore, to consider the other question discussed on the argument, whether the usurious transactions were set forth with sufficient particularity and precision to uphold the complaint as a pleading.

The order of the special term should be affirmed with costs.

COURT OF APPEALS.

ELI DOOLITTLE and others agt. THE BOARD OF SUPERVISORS OF THE COUNTY OF BROOME and others.

The plaintiffs, a portion of the freeholders of a new town, sought to be erected by the board of supervisors of the county, commenced the suit *on behalf of themselves and all other persons having an interest with them*, to restrain the organization of said town, on the ground that the proceedings of the supervisors in the matter were void; and the plaintiffs were about to be subjected to a jurisdiction for the purposes of local administration which had not been organized according to law.

Held, that the plaintiffs had not in their individual character a right to litigate that question with the public authorities. Whatever interest they had in the question, belonged to them only as citizens and members of the community, and no private person or number of persons can assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts.

But assuming that the act by which the old divisions of the towns were subverted and the new one attempted to be erected, was void, the officers constituted under the new arrangement, would have no rightful authority, and when their acts should result in directly touching the property or person of an individual citizen, the remedy for the wrong would be perfect in the ordinary course of justice.

The general rule is, that for wrongs against the public generally, whether actually committed or only apprehended, the remedy whether civil or criminal, is by a prosecution instituted by the state in its political character, or by some officer authorized by law to act in its behalf.

But where there is no direct individual injury, no action can be maintained by a citizen on the ground that his interests as a member of the state, have been interfered with or disturbed.

In the several recent cases decided in the first district, (reported in *Barbour & Howard*, particularly referred to,) the supreme court have undoubtedly overlooked the distinction between individual and public rights and remedies. These decisions are of too recent a date to furnish a precedent of themselves, overlooking as it seems, a well established rule of law, and should not be followed by this court. This court, however, is not required to pass upon the precise question which arose in those cases, in its decision of this case.

THE complaint in this action of several residents and freeholders of the town of Chenango in Broome county, prays that the proceedings of the board of supervisors of said county to divide said town and make three new towns therefrom, be declared void.(11.)

The complaint states that the plaintiffs are freeholders of that part of said town sought to be erected into a separate town by the name of Port Crane, and that the plaintiffs commence this suit on behalf of themselves and all other persons who have an interest with them in restraining the organization of said new towns.(11)

That the application to the supervisors as published, was for the erection of three new towns, including the whole of Chenango and parts of Colesville and Conklin, (15,) the new towns by the application to be called Binghamton, Castleton and Chenango. That the supervisors on the 3d of December, 1855, by act divided the town of Chenango, and erected three new towns, called Binghamton, Port Crane and Chenango, (28,) that no parts of Conklin or Colesville are included in the division. That officers were appointed to preside at the town meetings which were to be held on the 2d Tuesday of February, 1856. That the supervisors were not at their annual meeting furnished with a map and survey of all the towns to be affected, showing the proposed alterations.(37.) That the proposed formation of the said three towns is illegal, and that the town expenses will be thereby increased, and a town of inconvenient shape of about eleven miles in length, and for several miles one and a-half miles in width, will be formed.

That notices of town meetings under the proposed new organization are posted, and that the town meetings will be held,

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unless prevented by injunction, and if said towns are organized, numerous suits by *quo warranto* will be brought, and enormous expense and litigation commenced.(40.) That unless enjoined, the board of supervisors will recognize such organization. That neither a survey nor map with a certified statement as required by statute, have been filed in the office of the secretary of state,(41.) and that unless enjoined, the secretary of state will cause the statement of the board of supervisors to be published in the session laws.(41.) That the defendants who are appointed to preside at the town meetings, will preside unless prevented by injunction.

The complaint prays judgment declaring the proceedings of the supervisors in forming said new towns void, and that an injunction issue.

All of the defendants appeared and joined in their answer, and admit all of the allegations of the complaint, except they deny that the act organizing said new towns is void, or that the formation of said new town is prejudicial to the plaintiffs, or that their taxes will be increased, or that a town of inconvenient shape will be formed.(54.) They aver that a map and survey of all the towns to be affected was furnished the supervisors, and that a survey and map with the certified statement required by statute, has been filed in the office of the secretary of state.(56.)

The defendants deny the right of the plaintiffs to maintain this action.

The cause was tried before Mr. Justice GRAY at special term, in April, 1856, who adjudged that the proceeding of the said board of supervisors in forming said new towns was illegal and void. From the judgment ordered by Mr. Justice GRAY, an appeal was had to the general term, where the judgment at special term was reversed.(126.) The justice at special term found the facts as admitted in the pleadings as aforesaid,(110,) that no notice of an intended application to the board of supervisors of Broome county, for the formation of new towns, except as stated in the plaintiffs' complaint was posted and published (112;) that the only map before said board of supervi-

sors, was Burr's engraved map of Broome county ; and that no survey of the towns to be affected showing the proposed alterations, was furnished to said board of supervisors ;(114,) and that a map and certified statement was filed in the office of the secretary of state, and that said map so filed in the office of the secretary of state, (map opposite folio 108,) is entirely different from, and not a copy of the aforesaid Burr's engraved map.

From the said judgment ordered at general term this appeal is had.

HENRY R. MYGATT, *for the appellants.*

GILES W. HOTCHKISS, *for the respondents.*

DENIO, J. The objection is taken at the outset that the plaintiffs have not shown such an interest in the matter in dispute, as will enable them to maintain the action. This raises a question of considerable practical importance, which if it be now doubtful, ought to be definitely settled. It is not pretended that the plaintiffs have any interest which is not common to all the resident freeholders of the alleged new town of Port Crane. The grievance is, that they are all threatened to be subjected, for the purposes of a local administration, to a jurisdiction not created according to law. This will affect not only the other freeholders besides the plaintiffs, but all the inhabitants of that local district, whether they are freeholders or not ; for every person residing or owning property there will be liable in a variety of ways to the action of the local magistracy which the organization of the new town will call into existence. The same may be said of the portions of the original town of Chenango, which fall within the limits of the two other towns attempted to be created, and in a less degree of all the people of the county of Broome ; for in the legal arrangements for the administration of justice, and the management of the fiscal affairs of the county, the magistrates to be chosen in the new towns, will be often called upon to perform duties which will affect not only their proper towns, but the

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inhabitants of every town in the county. In a still slighter degree, but to an extent which may be appreciated, the substitution of pretended legal authority in any of the local divisions of the state for the rightful magistracy, works an injury to all the people; for the various and complicated official agencies by which the public business is carried on, require the co-operation of legal magistrates of every grade. An unauthorized and illegal change of the local districts into which the state for the purposes of administration is divided and subdivided, would naturally be productive of extensive inconveniences and losses to individuals, as well as to the state in its corporate character. Assuming that the act by which the old divisions were subverted and the new ones attempted to be created, was void, as the plaintiffs maintain in this case, the officers constituted under the new arrangement, would have no rightful authority, and when their acts should result in directly touching the property or person of an individual citizen, the remedy for the wrong would be perfect in the ordinary course of justice.

Hence, if the plaintiffs in this case, are correct in their principal position, that they or any of them, shall be directly disturbed in their personal rights or pecuniary interests, by any one acting under the resolution of the board of supervisors, they have only to appeal to the court for redress against the wrongdoer in the ordinary way. Up to this time no private interest of the plaintiffs has been invaded, and no injury peculiar to them is threatened. It is said that they may be assessed to pay taxes through the instrumentality of the officers of the new town. But as before remarked, if the proceedings to organize the town are void, no valid tax can be imposed through its agency, and the plaintiffs are under no necessity to institute a suit on that account. The real grievance of which they complain is, that they are about to be subjected to a jurisdiction for the purposes of local administration which has not been organized according to law; and the question is, whether they have in their individual character, a right to litigate that question with the public authorities? The general rule cer-

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tainly is, that for wrongs against the public generally, whether actually committed or only apprehended, the remedy whether civil or criminal, is by a prosecution instituted by the state in its political character, or by some officer authorized by law to act in its behalf. For example, criminal offences of every grade as is well known, are punishable only by prosecution at the suit of the people. Where a crime committed against the public also includes a private injury, the latter may, it is true, be prosecuted at the suit of the party injured; but where there is no direct individual injury, no action can be maintained by a citizen on the ground that his interests as a member of the state have been interfered with or disturbed, though in a general sense, every citizen has an interest in the maintenance of order and the prevention of crime. Where a person wrongfully assumes under color of an election or appointment, to hold a public office, which if the pretension were well founded, would enable him to do acts affecting the persons or property of his fellow citizens, every one, and especially those who would regularly be the subjects of his jurisdiction, has an interest of a certain kind in divesting him of his assumed authority, and yet nothing is more clear than that a private action for that purpose would not lie. The only method of ousting him is by information or action prosecuted by the attorney-general. (*People agt. Stevens*, 6 *Hill*, 616.)

The principle is further exemplified in questions respecting nuisances. Common or public nuisances, which are such as are inconvenient or injurious to the whole community, in general are, as all are aware, indictable only and not actionable; for as Blackstone says, "it would be unreasonable to multiply suits by giving every man a separate right of action, for what dam-nifies him in common only with the rest of his fellow citizens." (*Book 4*, p. 16; *Seely agt. Bishop*, 19 *Conn.* 128.) As this sort of injury if actually committed, can only be redressed by a public prosecution, so when it is only threatened, the preventive remedy by injunction can only be sought in the same manner. (*Anon.*, 3 *Atk.* 750; *Smith agt. The City of Boston*, 7 *Cush.* 254; *City of Georgetown agt. The Alexandria Canal Co.*,

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12 *Peters*, 91.) Where the act complained of, or which is apprehended, besides being a public nuisance, is *specially* injurious to a private person, he may maintain an action or a bill for an injunction in his own name. (*Avivden* agt. *Tickner*, 19 *Ves.* 616; *Spencer* agt. *The London & Birmingham Railroad Co.*, 8 *Sim.* 193; *Sampson* agt. *Smith*, *id.* 433; *Corning* agt. *Lowerie*, 6 *John. Ch. R.* 440.) In this class of cases, it is sometimes difficult to determine whether the act complained of is specially injurious to the plaintiff or not. In *Spencer* agt. *The London, &c., Railroad Co.*, where the bill was sustained, the act was the obstructing a street through which the plaintiffs had to pass from their stables to their place of business. In *Sampson* agt. *Smith*, where the plaintiffs also prevailed, it was the filling the street opposite the plaintiff's draper's shop, with smoke and soot from a steam engine, which the defendant used at his place of business on the opposite side of the street. In *Corning* agt. *Lowerie*, it was obstructing a paved street, upon which the plaintiff owned lots, and the injunction was granted. On the other hand, in *The City of Georgetown* agt. *The Alexandria Canal Co.*, the alleged nuisance was an obstruction of the channel of the Potomac river, which was a common highway, where it passed through the city of Georgetown. The court considered the plaintiffs as private persons, and inasmuch as they had not averred and proved that they were owners of property liable to be affected by this nuisance, they held that they could not maintain a bill for an injunction. The court stated the rule to be, that in the case of a public nuisance, where the bill is filed by a private person as being for relief by way of prevention, the plaintiff could not maintain a stand in court, unless he averred and proved some special injury. In *Bigelow* agt. *The Hubbard Bridge Co.*, (14 *Conn.* 565,) the plaintiff filed a bill to restrain the defendants from rebuilding a causeway across certain meadows adjoining the Connecticut river, which the plaintiff apprehended would cause the stream to overflow his lands and those of the other proprietors above. The court dismissed the bill, on the ground among others, that the injury, should it happen, was not peculiar to the plaintiff,

but common to the public generally. "To preserve and enforce the rights of persons, (the court say,) as individuals and not as members of the community at large, is the very object of all suits, both at law and in equity. The remedy which the law provides in cases where the rights of the public are affected, and especially in cases of public nuisances, are ample and appropriate." *O'Brien agt. The Norwich, &c., Railroad Co.*, (17 Conn. 372,) was a case of the same class. The act threatened was erecting a bridge over a cove or arm of the sea, which would prevent the inhabitants of Preston, of whom the plaintiff was one, from having access to the mouth of the river Thames. The bill was dismissed, on the ground that no damage peculiar to the plaintiff was shown. *Smith agt. The City of Boston*, (7 Cush. 254,) is a case to the same effect.

These cases are sufficient to show the principle upon which the courts act in this class of cases. In the present case, no difficulty of the kind referred to, arises. The act of the supervisors has no bearing upon the plaintiffs' individual interests. Whatever interest they have in the question belongs to them only as citizens and members of the community. The doctrine of the cases referred to, is at least as applicable to other acts where the injury is common to the whole community as to cases of nuisance. In *Hale agt. Cushman*, (6 Metc. 425,) it appeared that a town in Massachusetts had passed a vote to pay certain expenses, which the plaintiffs, "who were legal voters, and who together were liable to pay more than one-half of all the taxes to be assessed on the inhabitants of that town," deemed to be illegal. They filed a bill to enjoin the payment, which was dismissed, upon the principle referred to.

A contrary rule would be productive of very grave inconveniences. If the action can be sustained, any tax-paying citizen may compel the public authorities to litigate in the courts the acts of any administrative board or officer in the state; and thus proceedings which are intended to be summary and inexpensive, can only be perfected by the judgment of the court of final appeal. Every person may legally question the constitutional validity of an act of the legislature which affects

his private rights ; but if a citizen may maintain an action for such a purpose in respect to his rights as a voter and tax payer, the courts may regularly be called upon to review all laws which may be passed. They may, at the instance of any tax payer, be required to enjoin the comptroller from drawing warrants on the treasurer, and that officer from paying them, in every case where it may be conceived that the law authorizing the expenditure was passed without constitutional authority. The state tax of 1855, was lately impeached upon plausible grounds as having been unconstitutionally enacted. The question came before this court, and was decided upon a direct proceeding by the attorney-general against a board of supervisors. But upon the plaintiffs' position in this case, the state and county officers might be compelled to litigate the question of constitutionality with any tax payer who should see fit to question a state or local tax in any and every case, and thus the fiscal business of the state would come to be transacted mainly in the courts. The law does not, in my opinion, afford such an opportunity for excessive litigation. Where there is a question of official discretion, it must be decided by the officers in whom the constitution and laws have vested the discretion. If it be one of jurisdiction, a party who in common with his fellow citizens is menaced by it, must in respect to his legal remedy, wait until his individual rights are invaded. If the grievance consists in an alleged illegal exercise of official functions, those who question them, if they would have a particular remedy, must invoke the action of the officer whom the law has appointed to sue in such cases. No private person or number of persons, can assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts.

My attention has been called to a series of cases upon the general question under consideration in the courts of the first district, some of which seem to be in hostility to the views which I have stated. (*Adrian agt. The Mayor, &c., of New-York*, 1 Barb. S. C. Rep. 19 ; *Brower agt. The Same*, 3 id. 254 ;

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Christopher agt. *The Same*, 13 *id.* 567; *Milbau* agt. *Sharp*, 15 *id.* 193; *S. C.*, 17 *id.* 445; *Stuyvesant* agt. *Pearsall*, 15 *id.* 244; *De Burn* agt. *The Same*, 16 *id.* 392; *Wetmore* agt. *Storey*, 22 *id.* 414; *Davis* agt. *The Mayor, &c., of New-York*, 2 *Duer*, 663; *Roosevelt* agt. *Draper*, 16 *How. Pr. R.* 137.) So far as these cases hold that a party owning property fronting on a public street, is entitled to maintain an action to restrain the commission of an act of nuisance in the street, which from the location of the plaintiff's premises would render it specially injurious to him, I am of opinion that the law is correctly laid down. *Davis* agt. *The Mayor*, (4 *Kern.*) was decided upon that principle. But the cases referred to from the *first, third, thirteenth, fifteenth and sixteenth volumes of Mr. Barbour's Reports*, affirm that inhabitants, tax-paying citizens and owners of property in the city, can in respect to their interests as such, maintain suits to restrain the common council and other city officers from the performance of public acts alleged to be illegal. The decision in 2d *Duer*, and the one referred to from 16th *Howard*, denies the correctness of that doctrine. I have looked carefully into the judgments which go the length mentioned, for the reasons upon which they proceed. The first in order was an action to restrain certain appropriations of money by the common council, in which the corporation suffered the bill to be taken as confessed. The judge, EDMONDS, had doubts of the jurisdiction, but gave judgment for the plaintiff on the ground that the defendant had apparently acquiesced. In the next case (*Brower* agt. *The Mayor, &c.*), the corporation were enjoined against leasing a pier in the North river to the commissioners of emigration, to be used as a landing place for foreign emigrants. The judgment proceeds upon the assumption, that the act, if performed, would not be a function of government, but a disposition of property which the corporation held as owners, and that they were subject to the same duties in regard to it, and liable to the same remedies as though they were private owners.

In *Christopher* agt. *The Mayor, &c.*, the common council was enjoined at the suit of parties claiming no other interest

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than that of tax payers and freeholders, from proceeding with a contract made with an individual to build a market, on the ground that it was entered into in violation of the charter, and certain city ordinances. The title of the plaintiffs to prosecute was sustained upon the ground that the result of the proceeding of the council would lead to the imposition of a burden upon their property by means of increased taxation, and upon the supposed analogy between their position and that of the stockholders of a moneyed corporation. Two cases from the English chancery were relied on, which will be presently examined.

Milhau agt. Sharp was a suit to restrain the defendants from constructing a railroad in Broadway, pursuant to leave given by certain resolutions of the common council. The plaintiffs claimed not only to be *tax payers*, but owners of lots fronting on that street. An injunction was granted by a divided court; and so far as anything was said respecting the right of the plaintiffs to sue, it was sustained on the ground that they were *tax payers*, and the case of *Christopher agt. The Mayor, &c.*, was referred to as authority for that position. *Suyvesant agt. Pear-sall*, decided at the June term, where persons describing themselves as property owners and tax payers of the city, prevailed in an application for an injunction against parties holding a grant from the corporation, of a right to lay down a railroad through certain city streets. *Milhau agt. Sharp* afterwards came on to trial before Mr. Justice HARRIS, at a special term, when judgment for a perpetual injunction was given, but the plaintiff's right to maintain the suit was put expressly upon the ground that the act, if permitted, would cause a special and irreparable injury to the plaintiff's lots fronting on the street.

In *De Burn agt. The Mayor, &c.*, which was prosecuted by certain owners of real estate and tax payers, the corporation was enjoined by a court held before the judges, two of whom dissented, against entering into a contract with the other defendants, (who were also enjoined,) to employ them to lay down a pavement of a particular kind in certain streets of the city, the common council having resolved to enter into such a con-

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tract. The plaintiffs were determined to be competent parties to maintain the action, on the authority of the prior cases, to which I have referred, and another case to the same effect in the same court, which does not appear to have been reported.

Wetmore agt. Storey, the last of this class of cases which I have met with, was brought to enjoin the defendants against constructing the Ninth Avenue Railroad, and resulted in the award of a perpetual injunction. It does not certainly appear whether the plaintiff's title to prosecute was sustained on the ground of apprehended special damage to their lots on the street, or on the general doctrine established by the prior cases. These judgments all proceed upon the position that the acts of the common council, the execution of which was prohibited, were void either from want of authority or on account of a fraudulent breach of trust on the part of the members of the city councils. The acts which were about to be performed in the public streets, were as it was considered, without authority of law. The resolutions, ordinances and grants from the common council being held null and void. Under such circumstances, the contemplated disturbance of the streets would have been simply acts of nuisance. As regarded the community at large, they would be public nuisances which might be prosecuted by indictment and perhaps by information, at the suit of the attorney-general; and when especially injurious to the individual rights of particular persons, they would be the subject of private actions at their suit.

In sustaining actions by parties who only claimed to be owners of property, and persons liable to be taxed for public purposes in the city, I think the supreme court has overlooked the distinction which I have endeavored to point out between individual and public rights and remedies. With the single exception of two cases cited by Mr. Justice EDMONDS, in the case of *Christopher agt. The Mayor, &c.*, I do not find that any former precedent for the doctrine established, was supposed to exist in this country or in England. In the first of these two cases, (*Branley agt. Smith*, 1 *Simons*, 8,) certain waste lands in which the plaintiffs were entitled to rights of

common, were inclosed and allotted pursuant to a private act of parliament, which provided that the commoners who were interested might associate and make rules and regulations for their cultivation and management, and among other things might appoint a treasurer. The defendant was the treasurer under the act, and it was alleged that he had had thus appropriated moneys which he had received as treasurer, and that he contemplated further misappropriations. The bill was filed by nine of the persons who as householders and parishioners in a certain borough and parish, were commoners and interested in the inclosed lands, in behalf of themselves and the other commoners, for an account and an injunction against further misappropriation. The bill was sustained. Now, the right of common is as strictly a private right as any other interest in land. It is an incorporeal hereditament, and it is not less a private and individual interest in real estate when lands subject to rights of common, are allowed to be inclosed under private acts of parliament.

The other case is *Grey agt. Chaplin*, (2 *Sim. & Stew.* 167.) That was a bill by two of several shareholders, in a joint stock canal company, on behalf of themselves and all the other shareholders, to set aside an illegal agreement by which the managing commissioners had assigned the tolls to the defendant for ninety-nine years. It was a plain case of a bill for relief against the breach of a private trust, and the only point decided which has the remotest analogy to this case, is that a bill may be filed by a part of the persons in interest, where it appears that the relief sought by it is in its nature beneficial to all those whom the plaintiffs undertake to represent. I am of opinion, that neither of the cases sustain the position for which they were referred to in the supreme court.

The judgments of that court which have thus been briefly examined, are of too recent a date to furnish a precedent of themselves, and overlooking as it seems to me they do, a well established rule of law, I am unwilling to follow them in the decision of the present case. This case does not require us to pass upon the precise question which arose in those which

have been referred to. It may be that when a town is governed in its local affairs by means of a corporation, the citizens as corporators, stand in a different relation to the local government than in other cases. As that distinction, if it exists, would not aid the present plaintiffs, and as it has not been argued before us, we refrain from expressing any opinion upon it.

The judgment appealed from, for the reason which has been given, should be affirmed.

SUPREME COURT.

THE UNION BANK in the City of New-York agt. JACOB H. MOTT and GARRET S. MOTT.

The 183d section of the Code provides that the *order of arrest* "may be made to accompany the summons, or at any time *before judgment*."

Held, that the judgment here mentioned must be a *final* and absolute judgment, not a *conditional* judgment. That is, where a judgment entered by default against a defendant is, on motion, opened on terms, and the defendant allowed to come in and defend, the judgment in the meantime to stand as security, it is not such a judgment as prevents the defendant's arrest on the original cause of action.

New-York Special Term, December, 1858.

MOTION to vacate order of arrest.

Judgment was regularly entered in this action against the defendant Garret S. Mott, upon his failure to answer the complaint for \$198,000.87 damages, besides costs, on the 5th day of November, which judgment authorized the plaintiff to issue execution for its enforcement, as well against the body of such defendant as against his property. An execution against his property was issued upon the judgment to the sheriff of this city and county; but afterwards on the 11th day of November, such defendant obtained leave of the court to serve an answer to the plaintiff's complaint within ten days, and to pro-

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ceed with his defence in the action upon payment to the plaintiff's attorney of \$22.50 costs, and also the fees of the sheriff upon the execution. The court then further ordered that the judgment should stand as security for the alleged indebtedness of the defendant Garret S. Mott, to the plaintiff. He has put in an answer to the complaint, and the action is now at issue thereon.

An order for the arrest of both defendants was granted prior to the entry of the judgment; but Garret S. Mott was not arrested on it. After he obtained leave to answer the complaint and defend the action, an order for his arrest was granted by one of the justices of this court, bearing date the 8th day of December, instant; and he has been arrested on it, and is in prison, by reason of his failure to procure bail in the sum of \$142,000. His counsel now moves to vacate such order, on the ground that the affidavits were insufficient to authorize the same, and that no order for the arrest of such defendant could be made after the entry of the judgment against him.

SAMUEL A. FOOT, *for plaintiffs.*

D. DUDLEY FIELD, *for defendant.*

BALCOM, Justice. I think the affidavits contained facts sufficient to authorize the order. (*See 6 Abbott, 315.*) The important question to be determined is, whether the judgment estopped the plaintiff from procuring such order? The language of the Code is, that the order of arrest "may be made to accompany the summons, or at any time before judgment." (*Code, § 183.*)

I am of the opinion a judgment in an action must be *final* to estop the plaintiffs from procuring an order for the arrest of the defendant, in other words, it must be absolute and not conditional. The judgment in this action was final when entered, but its character was changed, upon the motion of the very defendant who now sets it up as an estoppel, from that of a final judgment to a *mere security* for his alleged indebtedness to the plaintiff; and should he be beaten upon the issues

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formed by his answer, no execution could be issued on it, unless the plaintiff should fail to collect by due course of law the judgment that would be entered on the finding of the jury upon those issues, and not then without leave of the court.

Garret S. Mott is defending the action as fully and as perfectly as he could have defended it if no judgment had been entered therein. And I think the judgment against him should be *deemed* vacated or set aside, so far as it affected the right to obtain the order of arrest which was granted subsequent to the time its character was changed.

If Garret S. Mott should now give bail, the undertaking of his sureties would not be conditioned that he should render himself amenable to such process as may be issued to enforce that judgment, but to such only as may be issued to enforce the judgment therein if one should be recovered by the plaintiff. (*See Code*, § 187.) In other words, his sureties would not be bound to surrender him upon any execution that may be issued on the judgment already entered, or upon any order that may be granted for its enforcement.

My conclusion is that the motion to vacate the order of the 8th of December, on which Garret S. Mott has been arrested, should be denied with \$10 costs.

Decision accordingly.

SUPREME COURT.

BROWN agt. GILMORE and others.

In an action brought by a plaintiff to recover damages for the forcible entry, taking and carrying away of personal property, of which he claimed to be owner, and in possession, the defendants in interposing a defence that they acted under the directions and by the authority of a *receiver* appointed in proceedings supplemental to execution of the property and effects of a judgment debtor, who was the plaintiff's vendor of the property in question, cannot interpose

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the defence and show on the trial that the sale made between the judgment debtor and the plaintiff was fraudulent and void as to creditors.

The question for the defendants to litigate, was the validity of the sale *inter partes*.

Whether there had been a sale, not whether it was made to hinder or delay creditors.

That is, the receiver could not justify the forcible seizure of the property, if the sale between the plaintiff and his vendor was a completed sale as between them; for the receiver could not, as representing the judgment debtor, impeach his own completed act, however fraudulent in purpose. Nor could he as representing the creditors, interpose such a defence, because the property, even if transferred with a design to delay and defraud creditors, did not for that reason belong to them so as to give the receiver absolute and immediate control over it. The only way the receiver could represent the creditors in that respect, would be to institute a suit to impeach and set aside the sale as invalid.

THIS was an appeal by the defendants from a judgment entered against them in favor of the plaintiff, on the 13th of June, 1857, for \$937.75 damages and costs. The cause was tried at the Kings circuit, in June, 1857, before Mr. Justice BIRDSEYE and a jury. The pleadings, complaint and answer are here given as follows:

"The complaint of the above named plaintiff respectfully shows the court, that on the 11th day of February, 1857, at Greenfield, in the county of Kings, the defendants without any lawful authority, forcibly entered upon the lands and premises of the plaintiff, and then and there took and carried away one sorrel trotting pony of the value of three hundred dollars, one brown pacing pony of the value of three hundred dollars, one wagon of the value of seventy dollars, two horse blankets of the value of five dollars, two surcingles and halters of the value of five dollars, one whip of the value of three dollars, and one white buffalo robe of the value of fifteen dollars, all the property of the plaintiff, and which the defendants have converted to their own use.

"Wherefore, the plaintiff claims a judgment against the defendants for the damages which he has sustained by reason of the premises, to the amount of two thousand dollars, besides the costs of this action."

The defendants Gilmore, Jarvis and White, put in separate answers, which were alike, as follows :

"The defendant William Gilmore, for answer to the complaint of the plaintiff, denies that he did on the 11th day of February, 1857, forcibly enter upon the lands and premises of the plaintiff mentioned in the complaint, or went there without lawful authority and took the property of the plaintiff described in the complaint ; and he denies that he individually or in connection with his co-defendants, converted any property of the plaintiff's to his or their own use ; and he says, that previous to the time stated in the complaint, a receiver had been appointed by the county judge of Kings county, under proceedings instituted pursuant to law, of all the property and effects of Samuel C. Brown ; that such receiver had previously taken possession of the said property, and this defendant says, if he interfered in any way in relation to said property, he so interfered and acted under the orders, or by direction of said receiver or his authorized agent ; and he denies that the property mentioned in the complaint, belonged to the plaintiff ; and he says, as to any other matter in the said complaint contained, and not hereinbefore answered, traversed or avoided, he has not any knowledge or information sufficient to form a belief, and he therefore controverts each and every of such allegations."

It was shown in evidence, that the property mentioned in the complaint, was taken by the defendants, Gilmore, Jarvis and White, on the 11th February, 1857, by directions of Daniel Van Voorhis, who was appointed receiver of the property of Samuel C. Brown, brother of the plaintiff, in proceedings supplemental to execution, on a judgment against Samuel C. Brown, in favor of the defendant Gilmore ; and that the plaintiff was in possession thereof, claiming it as the owner by a bill of sale, dated January 1st, 1856, made by Samuel C. Brown to him the plaintiff, of the property in question and other property. The judge charged the jury that the plaintiff claimed the property in question, under a sale from Samuel C. Brown ; that if such sale was made in good faith, and was accompanied or followed by an

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immediate delivery, with an actual and continued change of the possession of the things sold, that the plaintiff's title was complete, and he was entitled to recover in this action.

That for the purpose of testing the good faith of the sale by Samuel C. Brown, the jury might inquire, among other things, whether the price agreed to be paid on that sale was a just and fair one; whether such price was actually paid; whether the money paid on the sale was, as claimed by the plaintiff, all paid over to the defendant Gilmore, towards the satisfaction of the debt then due him from S. C. Brown; and whether they could have any design to delay or defraud the creditors of S. C. Brown?

That as to the delivery and change of possession, it should ordinarily accompany the sale; but that it would be sufficient if the delivery was made, and if there was an actual and continued change of the possession to the plaintiff before defendants took possession. To which defendants' counsel excepted.

That if the plaintiff, as principal, carried on the business of butchering at Greenfield, from September, 1856, to February, 1857, and in the course of that business, used the property sued for, it was a sufficient delivery. To which the counsel for the defendants then and there excepted. That if Crowell & Brown purchased this property in good faith, and actually went into the business, and conducted the same as owners and principals, they might employ Samuel C. Brown as workman, and that any acts done by him in that capacity while the employers were also present and acting in that capacity, and were in the possession and control of the property sold, would not avoid the sale. To which the counsel for the defendants then and there excepted.

That if the sale made by Samuel C. Brown was valid as between the parties thereto, and if the property sold was delivered to the plaintiff, and he was in possession before the receiver was appointed, then that the proper method of attacking the sale, if it was alleged to be fraudulent as to creditors, was by an action by the creditors against the parties to the alleged fraud or by causing an execution to be levied on the property,

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and the property to be sold thereunder, indemnifying the sheriff if that were necessary. That in case of such a sale, delivery and change of possession as last mentioned, the defendant had no justification for taking the property. That although the receiver was the officer of the law for certain purposes, he was not so for all purposes; that he was appointed for the benefit of the party who procured the appointment to be made, and was merely the grantee or assignee of such property and rights as the judgment debtor could himself exercise, control and convey. That if the judgment debtor could not have seized and taken away this property from the plaintiff, then that the receiver of his property could not do so; that the defendant White, the deputy-sheriff, did not act in that capacity in making the seizure of the property sold, he having no process, and not acting under the authority or in the stead of the sheriff.

WARING & SIDELL, *for defendants.*

D. P. BARNARD, *for plaintiff.*

By the court—EMOTT, Justice. I think the learned justice in a portion of his charge, went further in favor of the defendants than the law required. He submitted to the jury the *bona fides* of the alleged sale by Samuel C. Brown to the plaintiff, as affecting creditors of the former; putting the validity of the title of the plaintiff in this action upon the presence or absence in that sale, of a design to defraud the creditors of Samuel C. Brown. That was not the issue, nor had the defendants a right to litigate that question in the present action, as the circuit judge very properly intimated to the jury in another part of his charge. The question for them in the present suit was, the validity of the sale *inter partes*. It is true, that as the law is now settled, a receiver appointed in supplemental proceedings, not only stands in the place of the debtor but also represents creditors, and can, therefore, in a proper way impeach fraudulent acts of the debtor. (*Porter agt. Williams*, 5 *Seld.* 142.) But in neither capacity, could the receiver justify the

forcible seizure of this property, if it had been sold to the plaintiff by an actual and completed transfer, so as to make a valid sale as between him and his vendor.

The receiver and the defendants who acted under his authority, could not question such a transfer as representing the judgment debtor, for he could not impeach his own completed act, however fraudulent in purpose. Nor could such a defence be interposed in the present suit by this officer as representing the creditors, because, this property, even if transferred with a design to delay and defraud them, did not for that reason belong to them, so that they or their representatives could exercise an absolute and immediate control over it. They have only a right to subject the property as property of their debtor to the enforcement and collection of their judgments and the lien of their executions. Until an execution is levied upon personal property, the judgment creditor has no right in it or control over it. But the receiver does not stand in the place of an execution. The only way in which he can intervene in behalf of the creditors in such cases, is by instituting a suit to impeach and set aside the validity of such transfers.

The possession of this property after January, 1856, was, therefore, only important upon the question of delivery. The question for the jury was, whether there had been a sale, not whether it was made to hinder or delay creditors? The requests of the defendants' counsel were properly refused, and the charge was at least as favorable to them as they could have asked.

There is nothing in the exceptions to the rulings as questions of evidence, which require notice. The judgment should be affirmed.

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SUPREME COURT.

THOMAS J. WHITCOMB and others agt. THOMAS J. SALS-
MAN and CYRUS D. BOOTH.

A purchaser who obtains credit by a false representation, must be held to *intend* the legitimate consequences of his act. If he obtains credit by representations false in fact, and which he knew to be false when he made them, it will not do for him to say he did not mean to defraud the plaintiffs at the time.

New-York Special Term, October, 1858.

MOTION to discharge order of arrest.

E. DARWIN SMITH, Justice. If the plaintiffs are to be believed in the affidavit made by them, the defendant Salsman, obtained the delivery of the goods for which this action is brought, by a false representation in regard to the person of his partner Booth. So far as there is any conflict between the affidavits in respect to what took place at the time of the sale of the goods, the balance and weight of testimony is clearly in favor of the plaintiffs in the proportion of three to one. The plaintiffs say in their affidavit, that one of their number knew that Mr. Booth, who was the editor of *The Wisconsin Free Democrat*, and "who had been arrested on account of some difficulty connected with the enslaving or liberating slaves," was a responsible man; and that they sold and delivered the said goods on the faith of the representation that the partner of the said defendant Salsman, was such editor, and was, as the plaintiffs affirm the said Salsman said, "the very man," who was such editor, and had such difficulty. Salsman does not deny that he made such a representation, but he asserts that he had no intention to defraud the plaintiffs; that his partner had formerly been such editor; that his firm was in good credit at the time, and that he expected and intended to pay the plaintiffs for the goods purchased at the time of the purchase. But this will not answer. If he in fact obtained the

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credit for the goods by a representation false in fact, and which he knew at the time to be false, it will not do for him to say that he did not mean to defraud the plaintiffs at the time. They were, in fact, defrauded. They gave credit to a false statement, and the injury to them is the same as if the purpose of Salsman was ever so fraudulent at the time.

A purchaser who obtains credit by a false representation, must be held to *intend* the legitimate consequence of his acts. His intent must be inferred from his acts and declarations. The law requires men to speak the truth in making their contracts, and in all negotiations or representations, designed or calculated to influence the conduct of the opposite party in making a trade or giving a credit. The law of good morals and the law of the land coincide in this particular.

The motion to discharge the order of arrest should be denied, with \$10 costs.

SUPREME COURT.

HENRY G. SCUDDER agt. JAMES T. BARNES.

The defendant obtained credit upon these representations: "I am perfectly good and responsible for all the goods I may purchase; I own in Jersey City the house and lots in which I am living, which I value at between five and six thousand; and I consider this good and sufficient for any goods I may buy; I also own real estate in Williamsburgh, and I have other property."

The question was, whether this representation was false, and known by him to be so, when he made it.

The defendant, without any change having taken place in his circumstances in the meantime, about a month after such representations, made an assignment of all his property for the benefit of creditors; which assignment disclosed about double the amount of indebtedness, to the amount of property assigned. *Held*, that this exhibit of the defendant's affairs implied upon its face, that the representations made by him were clearly false, and must have been known by him to have been so.

MOTION to discharge order of arrest.

E. DARWIN SMITH, Justice. From the statement of the referee accompanying the evidence returned by him, which I think is fully warranted by the evidence, I think it fully established that the defendant made both the verbal and written representations in regard to his circumstances claimed by the plaintiff. The verbal representations are the only ones upon which the order of arrest could be sustained, nothing being due the plaintiff for the goods purchased upon the faith of the written representation. The representations were as follows: "I am perfectly good and responsible for all the goods I may purchase; I own in Jersey City, the house and lots in which I am living, which I value at between five and six thousand, and I consider this good and sufficient for any goods I may buy; I also own real estate in Williamsburgh, and I have other property."

The question presented is, whether this representation was false and known to be false by the defendant at the time. The right of the plaintiff to arrest him depends upon the establishment of the allegation in the language of section 179, subdivision 6, that "the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought."

The representation that the defendant "was perfectly good and responsible for all goods he might purchase," implies, taken in connection with the whole statement, that he had sufficient property over and above all debts and liabilities, to pay any debt he might incur in purchasing such goods.

The defendant, a short time after these representations, (the last written statement being made on the 10th of February, 1858,) made a general assignment of all his property, in which he assigned, as appears by reference to the schedule annexed, property to the amount of \$1,607, owing at the same time, debts as appears by schedule also annexed to said assignment, to the amount of \$2,802.80. The assignment is dated the 15th day of March, 1858. Obviously no change in his circum-

stances had taken place between the time of the making of the verbal and the written transaction, for they are substantially identical.

This exhibit of the actual condition and amount of the defendant's property and debts, implies upon its face, that the representations made by him in respect to the amount of his property and his pecuniary ability, were clearly false. If he was worth \$5,000 or \$6,000 on the 10th of February, he ought to have had property worth more than \$1,607 on the 15th of March, exclusive of debts. The inference of fraud in his original representation, and falsehood, is irresistible upon these facts. The burden of proof is then cast upon the defendant to explain these facts, and to show how his representations could possibly have been true. To my mind, he entirely fails to do so. He shows that all his property was sold and disposed of, (except that assigned,) before the making of the assignment. As he gives no account of the proceeds of such sale in his assignment, and as the schedule annexed thereto, contains no statement of any assets derived from that source, it must be inferred, I think, that whatever interest he had in such property was absorbed by pre-existing debts paid by such proceeds.

Speaking of the Jersey City property, which obviously constituted the bulk of the defendant's apparent property, the learned referee says in his opinion, "that if he really owed Hannah Smith, (to whom the same was conveyed on the 2d of March, 1858,) \$4,000 on the 22d of December, 1857, he manifestly was not perfectly good and responsible for all the goods he might purchase, and his representations to that effect were false, and the written representations of the 10th of February were equally deceptive."

But the referee then adds, "my impressions from the evidence are, that the defendant did not owe Hannah Smith." In another part of his report, the referee in stating the facts in regard to this sale to Hannah Smith, says, "Hannah Smith paid him no money when she took the deed. The defendant's account of it is that he was her debtor, and that the conveyance was made to her in payment of that indebtedness."

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The referee thinks the defendant mistaken in this testimony, that he "did not owe Hannah Smith." The effect of the referee's finding on this point is, that the defendant has sworn falsely in his account of the transaction, and, therefore, his original representation was not untrue.

In this finding I think the referee mistaken. The defendant should not be excused from the original fraud, on the ground that he has been guilty of false swearing in his statement of the manner and the consideration upon which he disposed of his property. The burden was upon him to explain how his original representation could be true, and he shows under oath that it was in fact false. I think he should be held to speak the truth under oath, and this substantially establishes his original fraud in contracting the debt. It may be, that the referee is right, and that the fraud of the defendant was committed in disposing of his property, rather than in contracting the debt to the plaintiff. But it is illogical and unjust to the defendant so to hold. It is more just to him to hold that he contracted the debt fraudulently, than that he fraudulently disposed of his property to avoid its payment, and sought to cover up the transaction by false swearing.

I think the defendant entirely fails to show that his representations were true at the time, and that the debt was not fraudulently contracted; and that the referee is mistaken in his conclusions on this point, and his report should be disaffirmed, and the motion to discharge the defendant from arrest denied, with \$10 costs.

Motion denied, with \$10 costs.

SUPREME COURT.

JAMES M. DAVIS, Respondent agt. HORATIO C. STONE and another, Appellants.

A judgment in a cause rendered in a justice's court, appealed to the county court, and by reason of the incapacity of the county judge to hear it, the appeal is transferred by the provisions of section 30 of the Code to the supreme court, it must be heard in the first instance at a *special term* of the supreme court. (*This agrees with Sheldon agt. Albro*, 8 How. 305.)

Cortland Special Term, August, 1858.

THIS action was commenced before a justice of the peace, who rendered a judgment therein in favor of the plaintiff, and from which judgment the defendants appealed to the Cortland county court. The county judge of Cortland county was incapable of acting in the cause, and for that reason the Cortland county court transferred it to this court.

The question was raised whether the appeal should be heard at a special term or a general term of this court.

A. McDOWELL, *for plaintiff.*

GEORGE A. WHITE, *for defendants.*

BALCOM, Justice. This cause has been transferred by the Cortland county court to this court, by reason of a clause in subdivision thirteen of section thirty of the Code, which clause is as follows: "But any action or proceeding pending in the county court, in which the county judge is for any cause incapable of acting, may be transferred by the county court to the supreme court, and thereupon the papers therein on file in the county court shall be transmitted to the supreme court, in the same district, which shall thenceforth have jurisdiction of such action or proceeding."

This provision cannot be construed to require the transmission of the papers in all actions and proceedings in the county

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court in which the county judge is incapable of acting, to the *general term* of the supreme court in the same district; for the reason that all such actions and proceedings in which no judgment has been rendered, must be determined in the first instance at a circuit or special term by a single judge of the court. (*See Code*, § 278.) Nor do I think it requires the papers in any such action or proceeding to be transmitted to the general term.

The statute which directs that appeals in the county court shall be brought to a hearing at a general term of that court, (*Code*, § 364,) has no application to the hearing of an appeal which has been transferred from that court to this court.

I am satisfied that section 346 of the Code, which provides for the hearing of appeals in the supreme court at a general term, embraces only appeals to that court from the decisions of inferior courts. The appeal in this cause was not brought to this court, but to the county court. It has been transferred from the latter court to this court, solely for the reason that the county judge is incapable of acting in the cause. And I think the appeal must be heard in this court on the original papers, in the same manner that it would have been heard in the county court, if the county judge could have decided it. (*See Code*, § 365.) The costs which the successful party will recover on the determination of the appeal in this court, are such only as he would have recovered if the county court had decided the cause. (*Taylor agt. Seeley*, 3 *Code Rep.* 84.)

The reasoning of the court in *Sheldon agt. Albro*, (8 *How. Pr. Rep.* 305,) has convinced me, that cases like the one under consideration, should be heard and determined in the first instance, at a special term of this court, and such has been the practice in this district. I should have been governed by the decision in *Sheldon agt. Albro*, (*supra*,) without attempting to demonstrate its soundness, if I had not been informed that one of my brethren in this district, had lately refused to hear a case like this at a special term, by reason of an unreported decision of the general term in the fifth district.

The decision in *Sheldon agt. Albro*, was made by the general

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term in the eighth district. And I am satisfied it is correct and must follow it in determining where the appeal in this cause should be heard in the first instance. Where a cause in which the county judge is incapable of acting, is determined by a single judge of this court at a special term, an appeal may be taken from his decision to the general term. (*See Code*, § 348.) And thus the same number of appeals are preserved, and the same amount of costs recovered in the cause, as if the county judge acted in it. This appeal must be determined at the special term in the first instance.

MASON, J., examined the foregoing opinion, and concurred therein. GRAY, J., after reading such opinion, expressed his views as follows: "The Code has not by any provision contained in it, prohibited an appeal from a justice's court, when certified to the supreme court by a county judge, from being heard and decided at special term. A special term is by the constitution, (*Article 6*, § 6,) a term of the supreme court. I have heard and decided such cases, and had not then and have not now, any doubt as to my jurisdiction."

• The general term in the 6th district, held in Cortland county in November, 1858, by GRAY, MASON, BALCOM and CAMPBELL, Justices, decided in *Crandall agt. Rodgers*, and in *Wiles agt. Peck and others*, that appeals from judgments of justices of the peace, which the county judge is incapable of deciding by reason of his relationship to the parties, or for other causes, must be heard in the first instance at a special term of the supreme court, instead of the general term. And all the justices concurred in the decision.

SUPREME COURT.

DAVID WILES agt. HIRAM PECK and others.

On an appeal from the judgment of a justice of the peace, to the county court, and the county judge from incapacity to hear the appeal, transfers it to the supreme court, this court is to hear the appeal on the *original papers* in the same manner that it would have been heard in the county court, "and no copy thereof need be furnished for the use of the court."

The papers, therefore, should remain on file in the office of the county clerk, (who is also clerk of the supreme court,) where they were transferred by the county court, and the appeal should be heard in that county, and in no other county.

Broome Special Term, November, 1858.

THIS was an appeal from the judgment of a justice of the peace in Cortland county, to the county court of that county. The county judge was incapable of hearing the appeal by reason of the fact that he had been counsel for one of the parties in the matters out of which the cause of action arose; and he transferred the cause to this court, pursuant to the directions contained in section thirty of the Code. The defendants' counsel objected to the hearing of the appeal in Broome county, and insisted that it should be heard in Cortland county.

S. KELLOGG, *for plaintiff.*

R. H. DUELL, *for defendants.*

BALCOM, Justice. Although it was the duty of the clerk of Cortland county to transfer the papers in the cause *to the supreme court in the same district*, (Code, § 30,) all he did or should have done, was to take them from the county court files, and place them on those of this court *in his own office*. He is the clerk of each court. (*Constitution, article 6, § 19.*)

The appeal must be heard in this court on the original papers, in the same manner that it would have been heard in the county court, if the county judge could have acted in the

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cause, "and no copy thereof need be furnished for the use of the court." (*Code*, § 365.) The clerk of Cortland county is not required to take the papers out of his county at the instance or request of either party; nor should he permit the attorney of either party, to bring them here or to carry them to any other county. The papers should remain on file in the office of the Cortland county clerk, until he is required by the court to bring them into the court-house in that county, on the hearing of the appeal.

For these reasons I am of the opinion the appeal in this cause should be heard in Cortland county. So decided.

SUPREME COURT.

LUCIUS N. BANGS, Receiver, &c. agt. SAMUEL PALMER and
NELSON DRAKE.

Where exceptions are taken on the trial at the circuit, and a "verdict is directed subject to the opinion of the court at general term, upon a case to be made by the plaintiff, with leave to either party to turn the same into a bill of exceptions or a special verdict," it is a *mistrial*. All the general term can do in such a case, is to order a new trial.

Although the decisions of the judge admitting or rejecting evidence, and which are excepted to, are questions of law, they are not those questions of law contemplated by the provisions of the Code, which relate to a case presenting only questions of law, and which may be heard in the first instance at the general term. The case itself must present the questions of law.

Orleans General Term, September, 1858.

GROVER, P. J., GREEN, MARVIN and DAVIS, *Justices*.

VERDICT subject to the opinion of the court at general term, upon a case to be made by the plaintiff.

A. MATHEWS, *for plaintiff*

W. F. ALDRICH, *for defendants*.

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By the court—MARVIN, Justice. The defendants took numerous exceptions to the admission of evidence during the progress of the trial. When the plaintiff rested, the defendants moved for a nonsuit, which was refused, and the defendants' counsel excepted. The defendants then gave evidence, and again moved for a nonsuit on numerous grounds, which the counsel specified. This motion was denied. The defendant Drake, then renewed the motion in his own behalf, which was denied, and he excepted.

The case states that the jury under the direction of the court, rendered a verdict for the plaintiff for \$158.04, subject to the opinion of the court at general term, upon a case to be made by the plaintiff, with leave to either party to turn the same into a bill of exceptions, or a special verdict, to which direction and finding the defendants then and there excepted. The plaintiff now moves for judgment upon the verdict and case, which contains all the exceptions.

The practice pursued on the trial, is entirely unauthorized. All we can do with this case is to direct a new trial upon the ground that there has been a *mistrial*.

All motions for new trials, and all applications for judgments on special verdicts or cases reserved for argument or further consideration, must in the first instance be heard and decided *at the circuit or special term*, except that when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance at the general term, and may in the meantime suspend the entry of judgment. In such case, they (the exceptions) must be heard at the general term in the first instance, and judgment there given. And where upon the trial, the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at a general term, and in that case, the application for judgment must be made at the general term. (*Code*, § 265.)

The order is not in this case, that the exceptions taken by the defendants, be heard in the first instance at the general term, but a verdict is directed, subject to the opinion of the court at general term, upon a case to be made by the plaintiff.

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It is not a case contemplated by the provision relating to a case presenting only questions of law. It is true, that all the decisions of the judge admitting or rejecting evidence and which are excepted to, are questions of law, but not those questions of law contemplated by that provision of the Code. The *case* itself must present the questions of law; that is, the *case* tried. The questions of law must arise out of the undisputed facts of the case. In such a case the court may direct a verdict subject to the opinion of the court at general term. The case will be settled in the form of ascertained and undisputed facts, involving no exceptions to the admission of evidence to prove these facts. The undisputed facts being ascertained, a question of law will be raised, which may be sent to the general term, by directing a verdict subject to the opinion of the court at general term.

We can pronounce no judgment upon the case containing the exceptions now before us, and all we can do is to order a new trial. (*See Cobb agt. Cornish*, 16 *N. Y. Rep.* 602; *Gilbert agt. Beach*, *id.* 606.)

SUPREME COURT.

EDWARD BROWN and others agt. JAMES K. BOWEN and others.

Where the plaintiff in an action on the case recovers judgment against one of two defendants, and the other defendant is acquitted, the latter is entitled as a matter of course, to a full bill of costs against the plaintiff.

And this is so, although the defendant acquitted was absent from the state at the time of the trial; but his co-defendant had in charge the preparation of the cause for trial, and the witnesses were subpoenaed and attended for both defendants.

THIS was an action on the case, and the defendant James K. Bowen, was acquitted, and a judgment recovered against Wells C. Bowen, and the defendant James K. Bowen, taxed

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a full bill of costs against the plaintiff, and this motion is for a re-adjustment.

MASON, Justice. The defendant was entitled to costs as a matter of course. (4 *Seld. R.* 29; see *resolution of court*, page 30; also 5 *Seld. R.* 549.) And besides, the judge at circuit gave him judgment for costs. The rule seems to be settled, that the defendants acquitted are entitled to a full bill of costs, notwithstanding the services rendered, and expenses incurred in their defence, were also rendered and incurred for the other defendant, against whom the plaintiff recovered a verdict. (*Canfield and others* agt. *Gaylor and others*, 12 *W. R.* 236; *Hinman and others* agt. *Booth*, 20 *W. R.* 666.)

The defendant swears that each and every of the witnesses were equally necessary for both defendants, and that each and every of the said witnesses were material and necessary for the defendant James K. Bowen, who was acquitted, and that he, the defendant Wells C. Bowen, had in charge the preparation of the cause for trial, for the said James K. Bowen, and that the said witnesses were subpoenaed and attended at said trial for both of said defendants. It is no answer, therefore, to the said defendant James K. Bowen's claim for costs, for the plaintiff to say that James K. Bowen had left the state long before the cause was noticed for trial, and was not personally present at the trial, &c., for the cause was prepared for trial by Wells C. Bowen. The clerk erred in taxing for attendance and travel of James Clarke and Asa Perkins \$4.02 each.

They swear that they were not subpoenaed or paid, and did not attend as witnesses for the defendants. There must be \$8.04 stricken from the taxed bill of costs, and from the judgment, if one has been entered. No costs on this motion to either party.

SUPREME COURT.

BUTLER, JR. agt. MASON & MASON.

It is *irrelevant* to insert an allegation in a complaint that the defendants have not resided at any time in the state, within six years before commencement of the action, for the purpose of anticipating the defence of the statute of limitations, although the complaint would show on its face without such allegation, that the claim was barred by the statute.

Section 74 of the Code says: that "the objection that the action was not commenced within the time limited can only be taken by *answer*."

New-York Special Term, June 12th, 1857.

THE complaint in this action demands judgment for debts incurred in 1844 and 1845; and for the purpose of anticipating the defence, that the claims are barred by the statute of limitations, it alleges that the defendants have not resided at any time within six years before the commencement of this action in the state of New-York. The defendants move to have this allegation struck out on the ground of irrelevancy. The plaintiff's counsel insists that it is material; as without it the complaint would show on its face that the claim was barred by the statute.

GEO. DOUGLASS, *for plaintiff*.

BOWMAN & GREEN, *for defendants*.

CLERKE, Justice. In maintaining his argument, the plaintiff's counsel overlooks the provision contained in section 74 of the Code, which declares that "the objection that the action was not commenced within the time limited, can only be taken by *answer*." So that evidently this allegation is unnecessary. Whatever may be the time stated in the complaint when the indebtedness was incurred, the plaintiff has a *prima facie* right to recover, and it is a mere optional privilege on the part of the defendants to interpose the defence allowed by

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the statute of limitations. If the defendants failed to answer a complaint showing on its face that the debt was incurred more than six years previous, judgment could be recovered by default, and no error would appear on the record. It is not necessary and, therefore, not relevant to insert the allegation complained of. In pleading, parties must be required to confine themselves to a statement of the mere facts essential to the maintenance of the action or the defence; and if a plaintiff were permitted to incumber his complaint with matters in anticipation of every possible defence which the apparent rights or ingenuity of a defendant may interpose, the record would be incumbered, and issues which may be otherwise avoided, would be introduced into the case. As it is probable that the plaintiff's counsel might have been misled by the decision in *Genet agt. Tallmadge*, (1 C. Rep. N. S. 346,) I grant this motion without costs.

SUPREME COURT.

JEROME PADDOCK agt. FREDERICK H. WING.

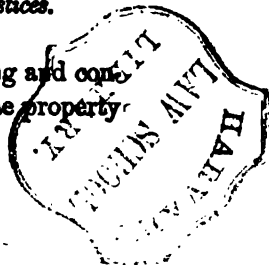
In an action for taking and converting personal property from the possession of the plaintiff, the defendant alleging that it was taken on execution in his favor by the sheriff, as the property of the defendant in the execution, the defendant on the trial cannot under the Code introduce the evidence of a witness to show that the property never belonged to the plaintiff, but that the witness was the owner of it, for the purpose of showing that the plaintiff is not the *real party in interest*. The plaintiff has an interest in and right to protect his possession.

Heard at Orleans, September General Term, 1858. Decided at Erie, November General Term, 1858.

GROVER, P. J., GREEN, MARVIN and DAVIS, Justices.

MOTION for new trial upon exceptions.

The complaint charged the defendant with taking and converting to his own use a large number of books, the property



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of the plaintiff. The answer was, first a general denial. 2d. It alleged that the title to the property was in one Tyrrell, and that the sheriff took the property by virtue of an execution against Tyrrell, issued upon a judgment in favor of the defendant.

On the trial, the plaintiff gave evidence tending to show that the property belonged to him and was in his possession at the time it was taken by the sheriff and sold to the defendant, under and by virtue of the judgment and execution against Tyrrell.

The defendant offered to prove by one Danforth, that the property was not and never had been the property of the plaintiff, but that it was the property of Danforth. The defendant's counsel stated that he did not expect to connect the taking of the property in any manner with the title of Danforth, so as to justify the taking by any authority or permission of Danforth, but he claimed the right to give the evidence for the purpose of showing that the plaintiff was not the party in interest in this action.

The judge upon objection rejected the evidence, and the defendant excepted. There was a verdict for the plaintiff, and an order that the exceptions be first heard at general term.

DE PUY & BOWEN, *for plaintiff.*

M. A. WHITNEY, *for defendant.*

By the court—MARVIN, Justice. Prior to the Code, the evidence offered by the defendant would not have been received, and this was conceded upon the argument. The plaintiff was in possession of the property, claiming to be the owner, at the time it was taken and converted, and such possession gave him an interest sufficient to maintain an action against a stranger or naked wrongdoer, or against any one converting the property, except the owner or one who had a right to the possession. (*Bowyer, Action at Law*, 430, *et seq*; *Duncan agt. Spear*, 11 W. 53; *McLaughlin agt. Waite*, 9 Cow. 670; 2 *Green. Ev.* § 437; 2 *Saund.* 47 a, note 1.)

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The defendant claims that the Code (§ 111) has changed the law. By that section, every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113. In my opinion the Code has not affected the question we are considering. The plaintiff was "the real party in interest." He had an interest in protecting his possession, assuming that the property was not his, that is, that he was not the owner, but that it had been and was the property of Danforth. For aught that appears in the offered evidence, the plaintiff was the bailee of Danforth, and if so, it was his duty to protect the property, and the action could be maintained by him or by Danforth, the general owner. (*Story on Bail*. § 94.)

The question presented in this case, was in the case of *Card* agt. *Cheeny*, decided some years since by the court at general term in this district. The like evidence was offered and rejected, and there was an exception. We held that the evidence was properly rejected.

There must be judgment for the plaintiff upon the verdict.

SUPREME COURT.

LOUIS POTTER agt. MICHAEL P. LOW.

Under section 297 of the Code in proceedings supplementary to execution, an order "enjoining and restraining the debtor from making any transfer or other disposition of his property, not exempt by law from execution, or from any interference therewith," (and that section allows of no other or different order,) does not at all affect the right of the debtor to what he earns *after* the granting of the order.

And where a defendant is ordered to show cause why he should not be punished as for a contempt in disobeying such an order, the affidavits must satisfy the court and show affirmatively beyond a reasonable doubt, that the money or property the defendant has received and paid out, &c., or any part of it was due him, or earned by him *prior* to the date of the order.

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First District, New-York Special Term, December, 1858.

THIS is a motion to require the defendant to show cause why he should not be punished as for a contempt, for disobeying an order dated the 13th day of October last, made by Mr. Justice INGRAHAM, in a proceeding supplementary to execution; which order contains these words, to wit: "The said Michael P. Low is hereby enjoined and restrained from making any transfer or other disposition of his property, not exempt by law from execution, or from any interference therewith."

BALCOM, Justice. The affidavits which have been read, clearly show that the defendant received and paid out about \$200 in money, subsequent to the time the order was served on him; but it is claimed by his counsel that such money was earned by him as a clerk, after the order was served; and that it only restrained him from interfering with such property as he had when it was granted.

There is some uncertainty as to whether the defendant earned the money after the order was made; but such uncertainty enures to his benefit, for the reason that he should not be punished as for a contempt, unless the affidavits show beyond a reasonable doubt that he disobeyed the order. I cannot say within this rule that the money the defendant has received and paid out, or any part of it, was due him or earned by him prior to the date of the order.

The main legal proposition to be determined, is whether the order restrained the defendant from receiving and disposing of his wages that he earned after it was made. It was settled by Chancellor WALWORTH, that a creditor could not on a bill in equity reach the effects of his judgment debtor, which he earned or acquired after the commencement of the suit; and that what he earned or acquired thereafter, could be obtained only by means of a supplemental bill. (8 *Paige*, 568; 2 *Barb. Ch. Pr.* 153.) And this court held at a general term in the 7th district, in 1851, that the debtor might receive and pay out money he acquired after the granting of an order forbidding him to interfere with his property. (13 *Barbour*, 335.) The principle was

then settled that such an order only affects the right of the debtor to interfere with or dispose of such property and effects ~~as~~ he has when it is made.

The plaintiff's counsel has argued that the Code as it now exists, makes the order so far prospective in its operation as to restrain the debtor from receiving or paying out money earned by him subsequent to its date. The amendment which has been made to section 297 since 1851, gives the debtor the earnings for his personal services at any time within sixty days, "next *preceding* the order," when the same are necessary for the use of a family supported wholly or partly by his labor. This provision certainly does not affect the right of the debtor to what he earns *after* the granting of the order. The defendant has no family, but the order does not restrain him from receiving and using money earned by him *after* it was granted any more than it would if he had a family that he supported wholly or partly by his labors. The order is the same whether the judgment debtor be married or unmarried, or whether he supports a family or not.

The authority to enjoin the debtor is in these words: "The judge may also by order forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith." (*Code*, § 298.) The *property* here mentioned, is that which the debtor has when the order is made, and not such as he afterwards acquires. If the legislature had intended the order should forbid the debtor transferring or disposing of his future earnings or acquisitions, other and more appropriate words would have been employed to convey that idea; and it is probable that some provision would have been made for supporting the debtor, at the expense of the county during the time he should be restrained from receiving or using wages earned by him *subsequent* to the date of the order. I have no doubt but that the meaning of the section referred to, is that the order shall only forbid the transfer or other disposition of such property as the debtor has when it is made.

My conclusion therefore is, that the defendant has not dis-

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obeyed the order served on him, and that the motion to require him to show cause why he should not be punished as for a contempt under section 802 of the Code, for disobeying the order, must be denied with \$10 costs.

SUPERIOR COURT.

WILLIAM CHAINE agt. LEWIS O. WILSON.

FOUR OTHER CAUSES OF DIFFERENT PLAINTIFFS agt. SAME DEFENDANT.

Attachments against the defendant as a non-resident debtor in these suits were sued out respectively on the 13th day of April, the 22d day of May, the 4th day of June, the 18th day of June, and the 1st day of July, 1858.

The defendant claimed and insisted that he was *not a non-resident*, but a resident of the city of New-York. The facts as found by the court, are fully set forth in the case, and are condensed into the *five propositions* stated at the commencement of the opinion of the court; it is considered unnecessary to repeat them here.

Held, that the defendant's domicile for the purpose of succession, testacy or intestacy, liability to taxation and enjoyment of the privilege of voting, continued through the whole disputed period, and was at the date of each of the attachments, in Norwalk, Connecticut. He must be considered as a mere sojourner in the city of New-York, with no intention of remaining there fixedly, but with an intention in all the vicissitudes of his business and of life, of permanently resting at Norwalk.

(*The case of Lee agt. Stanley*, 9 How. 272, and *Houghton agt. Ault*, ante, page 78, fully approved. Without indulging in any mere fancy or vanity in reference to the present opinion, it is with a good degree of professional pride that it is published and presented to the profession, as one of eminent learning, ability and strength. And it also reflects a corresponding degree of ability and force to the arguments of the distinguished counsel engaged in the case.—[REPORTER])

Special Term, September, 1858.

MOTION to discharge attachment in these suits against the property of the defendant Wilson, as a non-resident.

J. T. BRADY, *for the motion.*

J. W. EDMONDS and D. D. FIELD, *in opposition.*

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*Facts found by the court.**On appeal November 27th, 1858.*

The defendant admits he was a resident of Norwalk, where he resided when he retired from business in New-York, and fixes his *resolution* to become a permanent resident of New-York, to be in 1856. When he went to Norwalk, he went to reside on a farm belonging to his wife.

In August, 1856, he conveyed all the real estate and personal property which he owned in Norwalk, to his son Oliver. Oliver took possession of such property, "*and the farm aforesaid,*" referring, it must be assumed, to his wife's farm, "*and what had been the homestead,* and has continued to hold and own them." How Oliver could *own* the farm of the wife is not made to appear. The homestead may be supposed to have been his own real estate, as he says his family lived there at the time of the transfer.

His wife and youngest boy have been for long periods up to the present time in the house of his son Oliver. Not the slightest explanation is given as to what became of his wife's farm. The proof may be considered *first* as to his declarations and statements apart from his acts. Of course the acts of a party are far surer disclosures of his intent than his declarations. Yet declarations accompanied with or followed by acts consistent with them, may well be admitted, and are entitled to influence.

His resolution, his opinion, his intent, as now sworn to, can be of no avail. No declarations are stated to have been made until the fall of 1857, when his embarrassments caused his friends and clerk to suggest the uncertainty of his being a resident. Then he declared that no difficulty could arise, as he was a resident of the state. A statement under such circumstances can be of little moment.

Next, as to his acts: He fixes the period of his change of his residence (by a *resolution* to change it) in 1856, and by the conveyance to his son Oliver, which was made in August of that year. What did he do? He says, "that he had a room and was a permanent boarder at the Astor House, for a long time

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prior to the fall of 1857," spending most of his time in the city, going to Norwalk on Saturday and returning on Monday, sometimes also on Wednesdays.

Mallett (folio 105) states, "that Wilson was in the habit of coming to the Astor House frequently in 1857, up to the month of October, and remaining there during the business season of the year, several months at a time, at other times not in the business season, a day or two, or a week. When there for several months, he was in the habit of going away frequently, as deponent understood, to Norwalk. He never had more than one room, and that an ordinary bedroom. In the busy season, he would retain this for some time; at other times he would have no regular room, but was assigned some room that was vacant when he arrived. His family was not with him at the Astor House. He had very little baggage at the hotel, but usually a carpet bag." (*Banta and Jones, fol. 97.*)

I think it is the clearest of propositions, that down to the fall of 1857, fixed at October, Wilson was a resident of Norwalk. In October, 1857, he takes two rooms in the St. Nicholas Hotel, and brings his wife and child there; and occupied them from October to about the 22d of January, 1858. His wife and child then went to Norwalk to the house of the son Oliver, his grantee of 1856. The child had been taken sick, and was removed by advice of physicians.

It was the advice of his clerk and others, which induced him to remove his family to New-York. And then in the fall of 1857, the conveyance to his son is recorded. And in November, he voted in New-York. He followed his wife and child to Norwalk in January, 1858, and when he left in January, he vacated and gave up the apartments he had so occupied with his family, and has not since had any permanent apartment in such hotel." (*Mallett, folio 110.*)

He says that he left some personal property there. He does not specify what it was. No one from the St. Nicholas corroborates this. Consistently with Mallett's evidence, it must have been trifling. He remained at Norwalk, undoubtedly so ill as to be unable, or that it would have been imprudent to

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move, until May, 1858. His wife and child spent from March 22d, to March 30th, at the St. Nicholas, and then they went back to Connecticut. (*Coleman*, 80.)

He says that since the latter part of May, he has been residing at the said St. Nicholas Hotel, visiting his wife and child at Norwalk occasionally, and having recently (before July 30th, 1858) passed some time at Saratoga Springs, for his health. Mallett states, (111,) that, "at the times when said Wilson has since been at such hotel, (since he gave up his apartments in January,) he has been assigned to some vacant rooms, which he has been charged and has paid for only during such time as he occupied them, in the same manner as other guests temporarily visiting the hotel."

When Wilson left in January, he expressed to his clerk the intention to return in two or three weeks. The house had at that time suspended business. He conversed with friends, and made several efforts to get eligible property in New-York, to be owned for a permanent residence. The attachments were issued from the 13th of April, to the 1st of July, 1858.

I may add, that I am satisfied the dwelling at Norwalk conveyed to the son, was at all times afterwards as fully the home of Wilson and his family as it was before, as readily open to them, and almost as much used by them. Therefore the questions on these facts is narrowed down to two. Did the dwelling at the St. Nicholas, from October to January, give the defendant a new residence in New-York? If it did, was it not abandoned, and the old resumed at the period of the attachments?

I cannot conclude that so broken, interrupted, fitting dwelling in New-York as we find here, from October 1857, to April 1858, worked a change of a residence so clearly and legally fixed at Norwalk, at the first period.

The motion was heard before Mr. Justice HOFFMAN, at special term, who delivered the opinion which follows. Upon appeal, his order was affirmed by the general term. Mr. Justice WOODRUFF stated the decision in *Barry agt. Bockover*, (6

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Abbott, 374,) and entered into a full analysis of the various affidavits. He concluded that the judge at special term had found as matter of fact, that the defendant was not a resident of New-York at the times of suing out the attachments, and that the judges sitting in review of his conclusion, at least could not say that his verdict was not supported by evidence.

HOFFMAN, Justice. *First.* The domicil and residence of the defendant in Norwalk, Connecticut, down to August, 1856, must be conceded, I think, upon the defendant's own papers; and I feel justified in concluding, that it subsisted until the fall of 1857, when the deed to his son was recorded. He voted in Norwalk at the presidential election of November, 1856. He is retained upon the tax list of that town, and on the list of persons subject to a poll tax, for even the year 1858.

Second. During much of the year 1857, and down to October of that year, he occupied a room at the Astor House, without any part of his family, and frequently visited Norwalk. There his family dwelt during that period.

Third. In October, 1857, he took rooms at the St. Nicholas Hotel, and occupied the same with his wife and one child. There he remained until January, 1858, when he vacated the rooms and went to Norwalk. In March, his wife and child returned, and spent a few days at the St. Nicholas. His sickness which began in January, ceased in April, so far as that the physicians were discharged; and upon his own affidavit ended the latter part of May. We have no evidence of a residence for a day in New-York, during April or until the latter part of May, when he took a room, with occasional visits to Norwalk, and a visit to Saratoga for his health.

Fourth. When he left the St. Nicholas Hotel in January, his rooms were absolutely given up. When his wife returned for a few days in March, she occupied a room like other transient guests, and the same was the case when he returned at the end of May. His statement as to leaving some articles at the hotel is much too vague to form a ground of decision.

They must have been trifling ; the clerks have not been called upon to corroborate the statement.

Fifth. The advice which Hendricks gave the defendant, in the fall of 1857, to remove his family to New-York, was given and acted upon expressly from the apprehension that his then residence was in Norwalk, or might be so considered. The removal was to effect the object of avoiding the attachment laws if possible, not with a full intention to fix himself permanently in New-York. He voted in New-York at the last election for mayor.

The attachments in these suits were sued out respectively on the 13th day of April, the 22d day of May, the 4th day of June, the 18th day of June and the 1st day of July, 1858.

These facts present two striking points :

First. Of a clear case of domicile and residence at Norwalk down to the fall of 1857 ; and *next*, that at the time of issuing two of the attachments, there was no actual residence in this city, and had not been for about four months, but an actual residence in Norwalk, without the least connection with a residence in New-York by ownership of, or hiring a house, or even a room within it.

The character of the residence, from October, 1857, to January, 1858, may perhaps present a very different case from that which will arise upon the facts subsequently, and might have exempted the defendant from the provisions of the attachment law. But from January to the end of May, he had entirely detached himself from every semblance of residence in New-York, and had resumed his former domicile and dwelling. A more difficult question may be in relation to the other three attachments sued out, when he was in the actual occupation of a room in the hotel, had been so for over a month, and continued so for some time afterwards, with occasional absences.

It is to my mind clear, that his domicile, for the purposes of succession, testacy or intestacy, liability to taxation and enjoyment of the privilege of voting, continued through the whole period, and was, at the date of each of the attachments, in Norwalk.

The opinion of the master of the rolls in *Sommerville agt. Sommerville*, (5 Vesey R. 786,) is as sure a guide upon this question as can be found.

The domicile established upon the facts in the present case, is like the domicile of origin constituted there, "and it is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile."

So, LORD COTTENHAM says, in *Munro agt. Munro*, (7 Clark & Fin. Rep. 77 :) "To effect the abandonment of the domicile of origin and substitute another in its place, is required *le concours de la volonté et du fait—animus et factus*; that is, the choice of a place, actual residence in the place then chosen, and that it should be the principal and permanent residence."

The case of *Somerville agt. Anderson*, (22 Eng. Law & Eq. Rep. 614, and before the Privy Council, 29 id. 59,) applied the same rules to a domicile of choice, as are applicable to one of origin. The party had lost his origin of birth by residence in England, with intention to abide there; and was held to have lost the latter domicile from a residence in France, keeping house for thirteen years there, with only occasional absences, and to have acquired one in France. He broke up entirely his English establishment upon removing to France.

In *Evins agt. Smith*, (14 Howard U. S. S. C. Rep. 400, Curtis ed., vol. 20, p. 252,) Justice WAYNE, delivering the opinion of the court, says: "It is difficult to lay down any rule under which every instance of residence could be brought which may make a domicile of choice. But there must be to constitute it, actual residence within the place, with the intention that it is to be a principal and permanent residence."

And we find it laid down that the domicile of a married man is the place of his family's habitual dwelling, although he may be conducting business elsewhere. (*Phillimore on Domicil*, § 209, &c.; *Story's Conflict of Laws*, p. 57; *Catlin agt. Gladding*, 4 Mason's Rep; see also the elaborate opinion of Surrogate BRADFORD, in *Isham agt. Gebbins*, 1 Bradford's Rep.)

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It is not to be denied that domicile may exist independently of habitation, using that term as denoting merely actual abiding within a place. But contemplated habitation or rehabilitation is also an element in the legal idea of domicile when actual habitation does not exist. The dwelling in one place, which is thus consistent with a continued domicile in another, is under certain circumstances called a commercial domicile, the residence *negotiorum ratione*, of the civil law. (*Voet on the Pandects*, B. 5, Tit. 1, § 98; *Drake on Attachments*, § 67.)

In *Payne* agt. *Taylor*, (10th *Louisiana Rep.* 726,) the suit was commenced by attachment of the property of David Taylor, as a resident of Massachusetts. He had for several years before been dwelling in New-Orleans, and doing commercial business there under the name of D. Taylor & Co. In support of a motion to discharge an attachment, it was urged that his long commercial domicile made him a resident of New-Orleans, where he could always be served with process. But the motion was denied. The phrase in the Code of Louisiana is nearly the same as in our own. (*See also Bryan* agt. *Diaree*, 1 *Martin's Louisiana Rep.* 412, new series.)

Jackson agt. *Perry*, (13 *Bal. Mon.* 211,) is a valuable case to the point, that the ability to serve process upon a party from finding him within the state is not the basis of an attachment law against the property of non-residents. It must be admitted that several cases have countenanced the doctrine, that under the attachment law before the Code, the question depends upon the fact of a mere abiding in a place for some continuance of time, wholly irrespective of the true domicile. (*In the matter of Thompson*, 1 *Wend. R.* 45; *Haggart* agt. *Morgan*, 4 *Sandf. Rep.* 198, and 1 *Selden R.* 422; *Bartlett* agt. *The City of New-York*, 5 *Sand. R.* 46.) A very able, and to my mind satisfactory view of the cases, is to be found in the opinion of Justice JAMES, in *Houghton* agt. *Ault*, (16 *Howard R.* 78.)

That examination is, I think, sufficient to show that those cases, (even that of *Haggart* agt. *Morgan*, in the court of appeals,) as it did not control the case before the learned judge, could not govern the present one. Still the last-mentioned

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case, although the decision was upon the ground of the execution of the bond having concluded the party, may, perhaps, be treated as deciding that an absence of three years from an acknowledged domicile, and dwelling for that period in another place for business purposes, makes the party a non-resident of the first place within the statute.

It would be difficult to contest the truth of the converse of this decision, and to avoid holding, that if a party was dwelling habitually in New-York, for the same period and solely for business purposes, he would be deemed a resident of New-York, although his domicile was clearly elsewhere. But the principle of these cases opens the question of the nature, object and duration of absence or dwelling which is to control each particular case. It would not be pretended that the dwelling for a week for a special purpose in New-York made a party a resident, whose fixed habitation, or domicile was elsewhere. So we perceive that if the domicile does not supply a decisive rule, neither does the mere abiding within the place at the time of the service of the writ, furnish it; and thus each case must be left to the operation of all the rules usually applied to determine similar questions.

When this is conceded, then the case is open to the important consideration urged by Mr. Justice JAMES, that the attachment under the Code differs from that under the Revised Statutes, in this, that it is not a process for the commencement of an action, but is an arrest of the party's property in the nature of bail, for the payment of such judgment as he may obtain; that the statute was intended to give a remedy to creditors, whose debtors being absent could not be served with process, though domiciled within the state. The case of *Houghton agt. Ault*, decided at special term by Justice JAMES, was affirmed at general term of the 4th district. The facts were these: The defendant, a foreigner, had a family residing in Portsmouth, Canada, and there owned a ship yard. He leased a marine railway at Ogdensburgh, in July, 1856, began business there and carried it on until the issuing of an attachment in December, 1857. During this period he was most of the time at Og-

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densburgh, his family keeping house in Portsmouth. He continued to do work also at the latter place, where he had property to a considerable amount.

It was held, that his legal residence was in Canada, and a motion to discharge an attachment which had been issued was denied. The case of *Lee agt. Stanley*, (9 *How. Pr. R.* 272,) is referred to by the learned judge, and approved. There, the defendant kept a house in Bradford, New-Hampshire, where his wife and family resided, in which he entertained his friends, and was called by him his home. He had a store of goods and was doing business in Franklin county in this state. He appeared to have divided his time about equally between those two and a third place; an attachment was sustained by Judge CLERKE. He adopted the rule stated by Mr. Justice PAIGE, in *Crawford agt. Wilson*, (4 *Barbour's R.* 504,) that the terms legal residence, inhabiting, and domicil, mean the same thing, with few exceptions, and that the domicil in New-Hampshire remained unchanged.

Barry agt. Bockover, (6 *Abbott's Reports*, 374, *April term*, 1858,) was before this court at general term. The question arose upon the following facts, on a motion to discharge an attachment. The defendant was one of a firm doing business in New-York since January, 1854. He spent the whole of every business day in New-York, with the exception of occasional absences from sickness, or absence on business of the firm. All his working capital was invested in New-York, where his individual bank account as well as that of his firm was kept. He had spent eight hours of every business day in the city. Process could always have been served upon him, and was actually served at his store. His family, however, resided in Jersey City, in a house hired by him, and he slept there every night, with occasional absences, and remained there regularly from Saturday night to Monday morning. He owned no real estate in Jersey City. It was held that he was a non-resident, and an attachment was sustained by the court.

These cases appear to me to have restored the criterion of domicil to a strong, if not controlling influence upon these

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questions under the Code. Indeed, they decide little more than is contained in the early case of *Fitzgerald*, (2 *Caines*, 318.) The law of domicil has sprung from the Civil Code, and we may with advantage resort to the exposition of that law upon the subject. The statement of its rule generally found in treatise and decisions is, *ubi quis larem ac fortunarum suarum summam constituit*. The residue of the passage is, *Unde rursus non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur, quo si rediit, peregrinari jam destitit*. (*Domat*, vol. 2, p. 484.)

What is the meaning of the word *larem* in this definition? Lord ROSSLYN in the *Douglass case*, (see 5 *Vesey Rep.* 758,) adverts to an expression in one of the letters in evidence that the writer did not mean to set up his *tabernacle* in Scotland, and speaks of this phrase as a fair interpretation of the word *larem*. If we look to its signification in writers of acknowledged authority, it will be found to designate, either the tutelary deity of the hearth, or the only home of the family.[1]

In either sense, Norwalk constituted the *larem* of the defendant. So all that we can gather from the papers before us, as to the mass of his fortune, (*summam fortunarum*,) indicates the possession of a homestead in Norwalk, while his floating capital was in New-York, in the midst of agitation and peril. In the fall of 1857, "his commercial embarrassments began," and we may infer from the result that such capital was inadequate to meet his debts. Then it was that the deed of the homestead to his son was recorded, and then the advice to remove his family to New-York was given and acted upon. I may also refer to the comprehensive statement of the *legal*

[1] *Dii penates meum parentum familieque Lar pater, vobis mando; meum parentum rem bene ut tutemini; ego mihi, alios deos penates, persequar, alium Larum*. (*Plautus*.) *Laribus in foco, penetralibus, in atrio, aut interiore aedium parte sacra fiebant*. (*Ibid.*) *Omnium aedium; ac familiarum dii erant; usque focus peculiariter sacer erat*. (*Forcellini Lexicon in verbo*.)

Illos divas, aut amplius domos continuare nobis larem familiarum nusquam ullum esse. (*Sallust*.)

The definition *Domicilium* in the Dictionary of *Forcellini et cura Facciolati in, Domus, Edes, Domestica Habitatio*. (*In Verbo*.)

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meaning of the term in an eminent French author: "They who have no intention of fixing their domicile in a place, but are absent somewhere for convenience, necessity or business, cannot by any lapse of time create a domicile; neither the intention without the fact nor the fact without the intention is sufficient for this." (*D'Argentic*, art. 9, § 4, cited by *Phillimore on Domicil*, p. 11, *Law Library*, vol. 41.)

I do not think that this subject can be properly treated without adverting to the important decisions in admiralty respecting the residence of a citizen in an enemy's country, to subject his property to seizure and condemnation in time of war. The authorities before Sir William SCOTT, are all cited and commented upon in the great case of *The Venus*, (8 *Cranch R.* 253,) in the opinions of Justice WASHINGTON and Chief Justice MARSHALL.

It is sufficient for me to say, that the governing rule was admitted to be the removing from an established domicile, with the intention of making a permanent settlement, or for an indefinite time elsewhere. With such an intention the right of the domicile might be acquired upon a residence of even a few days. It was admitted in the case that the claimants had acquired a right of domicile in Great Britain, at the time of the breaking out of the war; and thus the question was, what was the consequence of the capture of such a person's property on the high seas?

I think that upon the application of the leading principles and cases I have thus referred to, the legal conclusion is, that the defendant Wilson, was not a resident of New-York at the date of these attachments. Through all the periods of his business prosperity, we find his domestic hearth and his household comforts at Norwalk—his hopes of the enjoyment of the fruits of his labor there concentrated; in adversity, we find that he turns to the same place for respite and repose. It is only when the struggle with hostile fortune had begun, and the apprehension arose, that his property might be swept away from the purposes to which he might wish to destine it, that he brought his family to reside temporarily in New-York. It

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is impossible, I think, to look upon him as more than a sojourner in this city, with no intention of remaining there fixedly, but with an intention in all the vicissitudes of his business and of life, of permanently resting at Norwalk.

The motion to discharge the attachments must be denied, with \$7 costs in each case.

SUPREME COURT.

THE NEW-YORK AND ERIE RAILROAD COMPANY agt. JAMES GILCHRIST.

The plaintiffs claimed as common carriers to recover of the defendant a certain sum for the transportation of cattle over their road. They relied upon their lien upon the cattle for their freight, not knowing certainly who the owner was. The defendant agreed to become responsible for the freight on the delivery of the cattle to a third person; thereupon the plaintiffs delivered them; and the defendant (being a butcher, but not the owner,) sold some of the cattle and received the proceeds, out of which he retained and was to pay by express agreement with the individual in whose name the cattle were shipped, the amount of the freight claimed. And the defendant subsequent to the delivery of the cattle by the plaintiffs, promised to pay them.

Held, that the promise of the defendant did not come within the statute of frauds, it was an original undertaking; and there was abundant consideration, both of benefit to the promissor and harm to the promisee, for the promise by the defendant to the plaintiffs.

New-York General Term, September, 1858.

Present, DAVIES, SUTHERLAND and HOGEBROOM, Justices.

THIS was an action to recover the sum of \$786, for the transportation of certain cattle over the plaintiff's road from Dunkirk to Bergen, in September, 1854. The defence was that the promise to pay was by parol, and void by the statute of frauds. The trial was had before Justice PEABODY, without a jury, on the 5th of March, 1857. He rendered judgment for the defendant, and the plaintiffs appeal to this court. The plaintiffs carried the cattle over their road, and there was no

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positive evidence that they knew who was the owner, apparently relying on their lien as common carriers for their protection. When the cattle arrived at Bergen, the person having them in charge, wished to remove them from the cars without prepayment of freight, which being refused, the defendant after a conversation with such person, agreed to become responsible for and to pay the freight. On the credit of which promise, the plaintiffs delivered them. The defendant also subsequently promised to pay. One Wing, in whose name the cattle were shipped, testified that they belonged to parties in Ohio. There were 97 in number, of which 27 were sold by the defendant, (who seems to have been a butcher or cattle dealer in New-York,) and he received the proceeds thereof, out of which he retained by express agreement with Wing, the amount sought to be recovered in this action, for the purpose of paying the freight and under an agreement that he would do so. Having failed to do so, this action was brought against him to recover the amount.

MR. EATON, *for plaintiffs.*

A. L. PINNEY, *for defendant.*

By the court—HOGEBOM, Justice. There can be no doubt of the result to which considerations of justice and equity between the parties would lead us in this case, and I think it can be reached without violence to the statute of frauds, or to any authoritative adjudications upon its provisions.

1. I regard it as a fair inference from all the evidence, and one which for purposes of justice we ought to adopt, that the defendant was either interested in the cattle as part owner or consignee, or in the profits expected to be realized from their sale. In either event, he had a sufficient motive for his conduct, and a pecuniary interest in procuring a discharge of the plaintiff's lien. There was, therefore, an abundant consideration both of benefit to the promissor, and harm to the promisee, for the promise by the defendant to the plaintiffs, which induced the practical surrender of their lien. (*Leonard agt.*

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Vredenburg, 8 *Johns*. 31; *Farley* agt. *Cleveland*, 4 *Cow.* 423; 2 *Parsons on Contracts*, 305.)

2. Again; I regard the transaction as an original one between the parties, and not a collateral undertaking to answer for the debt of another. The plaintiffs relied upon the property for their security. If they had a debtor they did not know who he was. The defendant or a third person, wanted to get the property. It was delivered upon the defendant's order at his request and upon his promise. It matters not whether it went immediately into his own hands or the hands of another. It was practically a delivery to him. Such third person must be regarded as his agent to receive it. (*Elwood* agt. *Moak*, 5 *Wend.* 285; *Wyman* agt. *Smith*, 2 *Sand.* 331.)

3. Again; the defendant is subsequently found in the possession of the property or a considerable portion of it, and making sale of it. His title to it or to its possession may possibly have been acquired subsequent to the removal of the cattle from the cars, but it is a more probable presumption that it was previous. He has in his own hands the proceeds of sale, and for the express purpose of satisfying this debt, and of discharging what was, I think, as to him a primary and original liability. The receipt of the money for the purpose indicated, is regarded by the learned judge who tried the cause in the court below, as sufficient to have turned the scale in favor of the plaintiffs, provided the pleadings had been so framed as to present such a cause of action. But the question at the trial did not turn on the pleadings; no objection was made to the testimony; nor to the form of the complaint. If there had been, the defect, if any existed, would doubtless have been remedied on the spot. The cause was tried on its merits, and should be so decided. Technical objections to defeat justice should not be encouraged, and should never be listened to, unless promptly made and distinctly presented.

I am of opinion that the judgment of the circuit should be reversed and a new trial granted, with costs to abide the event.

SUPREME COURT.

In the matter of HENRY SMITH, an alleged habitual drunkard.

The 8th subdivision of § 30 of the Code, when read in connection with the 11th subdivision thereof, and with the 3d section of 2 Revised Statutes 52, title 2, (which is not repealed by the Code,) must be held to confer jurisdiction upon county courts, respecting *habitual drunkards*, only when the property of the drunkard amounts to less than \$250.

Therefore, where the county court of Broome county entertained proceedings on petition of overseers of the poor, against an habitual drunkard, whose property amounted to over \$4,000, and its decision was appealed from to this court; *Held*, that the county court had no jurisdiction of the proceedings; and the decision of that court therein was subject to review by this court upon appeal, in the same manner that decisions of courts of common pleas were reviewed on appeal by the late court of chancery. Proceeding of county court reversed with costs.

Cortland General Term, November, 1858.

Present, GRAY, MASON, BALCOM and CAMPBELL, *Justices.*

PROCEEDINGS were instituted in the Broome county court, by Thomas Cary, as overseer of the poor of the town of Nanticoke, to have Henry Smith declared an habitual drunkard, and for the appointment of a committee of his person and estate. An inquisition was taken and returned to the county court, finding Smith to be an habitual drunkard, and incapable of conducting his own affairs.

The petition of the overseer of the poor upon which the proceedings were founded, and the inquisition, both showed that Smith had property situated in the county of Broome, of the value of about four thousand dollars. Upon the return of the inquisition to the county court, counsel for Smith opposed the confirmation of the same, on the ground that that court had no jurisdiction to entertain the proceedings. First. Because the amount of property belonging to Smith, as appeared in the proceedings, exceeded two hundred and fifty dollars; and secondly. Because, the petition of the overseer of the poor, on which the commission was issued, by virtue of which the in-

In the matter of Henry Smith.

quisition was made, did not state facts sufficient to give jurisdiction; and because sufficient facts and circumstances were not shown by affidavits or otherwise, to warrant the issuing of the commission. And upon those grounds, Smith's counsel asked the county court to dismiss the proceedings. But that court refused to do so, and held that it had jurisdiction of the proceedings, and would entertain and proceed with the same.

Smith appealed from the decision of the county court to this court. He served notice of his appeal on the county judge of Broome county, and filed his petition of appeal to this court, in the office of the clerk of that county, in which petition he made the overseer of the poor respondent. The overseer filed his answer to such petition, in the same clerk's office; and the case has been argued upon the notice of appeal, petition of appeal, answer of the overseer of the poor thereto, and the return of the county judge and county court, to the notice of appeal.

MCDOWELL & EDWARDS, *for the overseer.*

G. L. SESSIONS, *for Smith.*

By the court—BALCOM, Justice. An objection has been made on the part of the overseer of the poor, that the appeal to this court in these proceedings is unauthorized and cannot be sustained. It was made the duty of overseers of the poor, by the Revised Statutes, to make application to the court of chancery for the exercise of its powers and jurisdiction over the persons and estates of habitual drunkards, when they have property to the amount of two hundred and fifty dollars. (2 R. S. 52, title 2, § 2.) And it was further provided by section three of the same title of such statutes, "if such drunkard have property to an amount less than two hundred and fifty dollars, the overseers may make such application to the court of common pleas of the county; which is hereby vested with the same powers in relation to the real and personal estate of such drunkard, as are by this title conferred on the court of chancery, and shall in all respects proceed in the like manner, *subject to an appeal to the court of chancery.*" (See 1 Barb. Ch. Pr. 440.)

The court of chancery and courts of common pleas, were abolished by the constitution of 1846. County courts were substituted for the common pleas, and this court was clothed with all the powers and jurisdiction of the court of chancery. The powers and jurisdiction of this court and of county courts were defined by the legislature in 1847. (*Laws of 1847, Vol. 1, p. 323, § 16; id. pp. 328, 329, 330, §§ 31, 36.*) The jurisdiction of county courts was afterwards prescribed by the Code of Procedure. (*See Code, part 1, title 4.*)

These proceedings when in the county court, were not an action, (*Code, §§ 2, 3,*) although when brought into this court for review, they are to be deemed an action at issue on a question of law for all the purposes of costs. (*Code, § 318.*)

The Code only allows appeals to this court from judgments of county courts, (*Code, § 344,*) and from orders made by county judges in actions. (*Code, § 349.*) There is no provision in it for appeals to this court from orders made by county courts or county judges in special proceedings. No judgment has been rendered in these proceedings; and there is no authority in the Code for an appeal to this court from the decision of the county court therein. The act of 1854, "in relation to special proceedings," gives no appeal from the decisions of county courts in such proceedings. The appeal, therefore, was not authorized, unless provision therefor is to be found in some other legislative enactment; for no right to *appeal* in such a case existed at common law. If the third section of the Revised Statutes above quoted, is in force, the appeal was authorized, and the proceedings are properly before us. That section authorized an appeal from the determinations of the common pleas courts in such proceedings to the court of chancery. The same power and jurisdiction conferred by that section of the Revised Statutes upon courts of common pleas, were conferred upon county courts by the judiciary act of 1847. (*Laws of 1847, Vol. 1, p. 330, § 36.*) The like power and jurisdiction are also conferred upon the county courts by the Code. (*See Code, § 30, subdivision 11*) And this court, as has already been seen, stands in the place of the court of chan-

cery, and has all *the powers and jurisdiction* which that court possessed.

The third section of the Revised Statutes above mentioned, is contained in title two of chapter five of the second part of such statutes; and that part of the Code which relates to civil actions commenced since the first day of July, 1848, (*see Code*, § 8,) is declared not to affect "any proceedings provided for by chapter five of the second part of the Revised Statutes." (*Code*, § 471.)

Section twenty-nine of the Code, contains the declaration that county courts "shall have no other jurisdiction than that provided in the next section." By the next section, (30,) the county court has jurisdiction in the following special cases: "The care and custody of the person and estate of a lunatic or person of unsound mind, or an habitual drunkard, residing within the county." (*Subdivision 8.*) To exercise all the powers and jurisdiction conferred by statute upon the late courts of common pleas of the county, or the judges or any judge thereof respecting "habitual drunkards." (*Subdivision 11.*) By construing these two subdivisions of the thirtieth section of the Code together, it seems to me that the above mentioned section three of the Revised Statutes cannot be regarded as repealed. It certainly is not expressly repealed, and I think it is not abrogated by implication. And I am of the opinion the eighth subdivision of the thirtieth section of the Code, when read in connection with the eleventh subdivision thereof, and the before mentioned third section of the Revised Statutes, must be held to confer jurisdiction upon county courts, respecting habitual drunkards, *only* when the property of the drunkard amounts to less than two hundred and fifty dollars.

If these views are correct, the Broome county court had no jurisdiction of these proceedings against Smith, for his property amounts to about \$4,000; and the decision of that court therein is subject to review by this court upon appeal, in the same manner that decisions of courts of common pleas were reviewed on appeal by the late court of chancery. (*See 1 Barb.*

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Ch. Pr. 439 and 440.) I think the proceedings in the county court in this case should be reversed with costs.

Decision accordingly. CAMPBELL, Justice, dissenting.

SUPREME COURT.

DAVID DOWS and others agt. CHARLES CONGDON and others,
owners of the Canandaigua and Niagara Falls Railroad.

Where a railroad company take the title of a piece of land for their road, under and in pursuance of the statute, on making due compensation for its value, upon which land there is a prior mortgage, of which the company have constructive notice, and upon which land the company have erected valuable improvements;

Held, on a foreclosure and sale in parcels of the whole of the mortgaged premises, that the railroad company were bound to contribute to the payment of the mortgage debt, if the same was not paid by the sale in the inverse order of alienation of the other property covered by the mortgage, the full value of the piece of land taken and appropriated by them *at the time of such appropriation*, with interest thereon to the time of payment. This is the "due compensation" of the constitution.

That is, the railroad company in effect, have a right to redeem their lands from the lien of the mortgage on the payment of a rateable proportion of the mortgage debt, which they must do to the full value of the property (at the time of its appropriation,) with interest if need be, *irrespective of the improvements put thereon by the company*.

Monroe Special Term, November, 1st, 1858.

MOTION to set aside sale of portion of the Canandaigua and Niagara Falls Railroad.

At Leroy, in Genesee county, this road approached a mill race upon a high embankment, and crossed the race at right angles upon a stone culvert. The embankment was some 100 feet in width at its base, and the culvert some 70 feet in length. This mill race led to a mill some distance north, which at the time of the construction of the railroad was covered by a mort-

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gage, which also embraced the mill race to its head. The railroad company entered upon the premises in 1852, under a contract of purchase from the owners of the fee of this mill property, race way, &c., and constructed said embankment and culvert for their railroad, and have since occupied the same for the purpose of such road. The track of the Buffalo, Corning and New-York Railroad Company, also crossed this mill race at another point. The plaintiffs commenced a suit in this court to foreclose their said mortgage, making the two railroad owners and others parties, and obtained the usual decree of sale. The owners of both railroads appeared in the suit, but on the sale the agent and attorney of the owners of the Canandaigua and Niagara Falls Railroad failed to be present through an accident, and the premises were sold in parcels. The mill property, including all the rights and easements in relation to the mill race for about \$7,000, leaving a deficiency of \$2,300, for which the strip of the Canandaigua and Niagara Falls Railroad consisting of the stone arch and a few feet of the embankment leading to it, excepting the mill race and the right and easement thereof for the use of the mill, and the flow of the water thereto, was sold to Thomas Brown, who gave his note to the mortgagees therefor, payable in six months.

The motion was now made to set aside the sale, upon various allegations of mistake, unfairness, concealment and surprise, and other grounds.

CLARKSON N. POTTER, *for owners of the C. & N. F. R. R.*
J. G. HOYT, *for plaintiffs and purchaser.*

E. DARWIN SMITH, Justice. This motion I deemed it proper to grant on the hearing for reasons then orally expressed; but the importance of the questions involved in the decision is such that I think it may be useful to put my reasons and views of the case in a more permanent form, as I am not aware that the points here decided have been before distinctly raised in this state.

The Canandaigua and Niagara Falls Railroad Company, are

a corporation authorized to take lands for their railroad, and such lands are deemed taken for the public use. Such is the declaration of section eighteenth of the general railroad act.

They entered upon and took the land in question upon purchase of the same from the owners in fee of the soil, and constructed their road thereon, with the knowledge of the plaintiffs and of such owners. They must, doubtless, be deemed to have constructive notice of the plaintiffs' mortgage. At the time when they entered upon such premises, the value of the strip of land taken by them must have been quite trifling. As land separate from the mill race and the easement thereof, the plaintiffs could not have looked to it as constituting any appreciable portion of their security for the payment of their mortgage debt. The company omitted by mistake or from ignorance of the actual existence of this mortgage, to extinguish the lien thereof by release or otherwise upon the strip of land so taken by them, but proceeded at a large expense to construct the arch across the race and the approaches to it in question, and have used it ever since, and its use is indispensable for their railroad. The plaintiffs' mortgage being unpaid, they have come into this court as a court of equity, and sought its aid to obtain payment by sale of the mortgaged property.

Strictly speaking, their mortgage as a legal conveyance, covers all the lands embraced in it downward and upwardly, *cujus est solum ejus est usque ad cælum*. But in equity they have but a lien as security for their debt. And when they come to a court of equity for its aid in enforcing their mortgage, must they not do equity like all other suitors in this court? What equity have they to extort a great disproportion in amount of their debt from these defendants? While a court of equity, should it aid them to appropriate to their own use the value of the erections and improvements put by the defendants upon the small strip of land covered by their mortgage? I think not. It seems to me, that the fundamental principles and actions of this court forbid it. The simple application of the maxim in equity, "he who seeks equity must do equity," seems to me conclusively to answer the whole

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question. It is quite analogous to the case of partitions between tenants in common. When one tenant in common comes into equity for partition of the common property, this court makes a just partition and allows, or makes a complainant allow, for improvements. This is a familiar doctrine in this court. This court will not grant partition without compelling the party applying to make due compensation for improvements. (*Swan agt. Swan*, 8 Price R. 518; 1 *Story's Equity*, 655, 656 b; *Green agt. Putnam*, 1 Barb. 500; *Taylor agt. Baldwin*, 10 id. 593.)

Courts of equity will not lend their aid to deeds or acts of injustice. When they have jurisdiction of the parties and subject matter, they compel full justice to be done. When that cannot be done, they refuse their aid. It is doubtless true that courts of equity have not yet gone so far as to decree compensation for improvements made by a possessor of land under a defective title as against the true owner, except in cases of an implied agreement, as between joint owners, or where the true owner stands by and suffers improvements to be made upon his estate without notice of his title, or in cases of trust or fraud. In a direct suit by the *bona fide* possessor who had been evicted by the true owner, the court has not assumed jurisdiction to give affirmative relief. (2 *Story's Equity*, 799; *Putnam agt. Riches*, 6 Paige, 390.)

But as Chancellor WALWORTH says in this last case: "The principle of natural equity is constantly acted upon in this court, where the legal title is in one person who has made improvements in good faith, and where the equitable title is in another who is obliged to resort to this court for relief. The court in such cases acts upon the principle that the party who comes here as a complainant to ask equity, must himself be willing to do what is equitable." This rule, when the true owner asks relief as against a party in possession under a defective title, is uniformly applied in this court. (2 *Story's Eq.* §§ 799, 1237; *Robinson agt. Riddle*, 6 Mad. 2; *Bight agt. Boyd*, 6 Mad. 411, and 1 *Story*, 478; *Green agt. Biddle*, 8 Wheaton, 77.)

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The defendants, the said railroad companies, are entitled under section 21 of the general railroad act, to perfect their title to the strips of land taken and used for their said railroads, and this court is bound to protect their possession pending proceedings for that purpose. Due compensation for such lands would be the payment of their value at the time of the defendants' respective entry thereon with interest. But I do not think it is necessary for the defendants to go through the process of re-appraisement under the statute. This court can in this suit provide for the making of this compensation independently of the mode prescribed in this statute for a re-appraisement, and upon equitable principles upon the equity of the statute.

The provision of this statute gives an additional remedy to the defendants. It gives them an absolute right to the title and possession of the property on making due compensation for its value at the time when it was taken by the defendants with interest thereon. It gives them in effect a right to redeem their lands from the lien of this mortgage on the payment of a rateable proportion of the mortgage debt, which they must do to the full value of the property if need be, irrespective of the improvements put thereon by the defendants. The right to perfect their title on making such compensation in legal effect, is equivalent to an apportionment of the lien of the plaintiffs' mortgage, and limits the amount thereof chargeable to the said defendants, to the amount of such due compensation. They are not left to the caprice of the mortgagees, as perhaps might be the case with private persons.

The plaintiffs have no equity in this case, except to be paid their debt. They have no claim upon the defendants crossing this mill race, except that they shall contribute to the payment of this debt, if the same is not paid by the sale in the inverse order of alienation of the other property covered by their mortgage in just proportion and in the order of their respective titles. Obviously, these corporations must contribute in the inverse order of their respective entries upon or appropriation of the mortgaged property. All that the two railroad com-

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panies should be required to pay in satisfaction of the mortgage debt, is the full value of the respective parcels of the mortgaged property taken or appropriated by them at the times of the appropriations thereof for the use of their respective railroads, with interest thereon to the time of payment. This is the due compensation of the constitution. On the payment of such sums, the decree should be deemed satisfied and discharged as respects their respective parcels, and the plaintiffs restrained from doing any act to the prejudice of their respective titles to or possession of such parcels.

Apart from these views, this is a clear case for relief to the defendants who now move. Not only were they prevented by accident from being present, but there were many things connected with the plaintiffs' proceedings calculated to seriously mislead them. If, however, it was clear that the order of sale adopted was correct, and that the defendants were entitled to no relief because of their improvements, I should then make the resale conditional on their bidding the amount of the deficiency, as well as the payment of costs, &c.

With my views, however, with regard to their rights, it should be referred to a referee to ascertain and report the amount so to be paid by the said railroad companies upon these principles, and it is so ordered and the sale set aside on payment of all the costs since the decree, and \$10 costs of opposing this motion, to be paid by the moving defendants, to the purchaser and also to the plaintiffs.

NOTE.—The case of *Lemon agt. Trull*, (13 How. 248,) was affirmed by the court of appeals at its last session, (December, 1858,) thus sustaining the doctrine that a claim to recoup for a breach of warranty is a *counter claim*. This decision overrules the case of *Nichols agt. Boerum*, (6 Abb. 290.)

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